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APPENDIX

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Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-123 and 71-198

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

BURNS INTERNATIONAL SECURITY SERVICES INC., ET AL.,
Respondents,

and

BURNS INTERNATIONAL SECURITY SERVICES INC., ET AL.,
Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI IN NO. 71-123 FILED JULY 23, 1971
PETITION FOR CERTIORARI IN NO. 71-198 FILED AUGUST 9, 1971
CERTIORARI GRANTED OCTOBER 12, 1971

Supreme Court of the United States

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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10.25.67	Complaint & Notice of hearing, dated
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5. 7.70	Decision and Order issued by the National Labor Relations Board
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UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 31-CA-776

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.

and

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162

and

AMERICAN FEDERATION OF GUARDS, LOCAL 1, PARTY IN INTEREST

DECISION AND ORDER

On June 4, 1968, Trial Examiner E. Don Wilson issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in certain other unfair labor practices. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief, and the Charging Party (herein referred to as the Union) and General Counsel filed briefs in support of the Trial Examiner's Decision.

On January 31, 1969, the National Labor Relations Board, having determined that the instant case raised issues of substantial importance in the administration of the National Labor Relations Act, as amended, ordered that this case be consolidated with three others[1] for the purpose of oral argument before the Board on March 12, 1969. The parties were given permission to file further briefs. Subsequently, on February 19, 1969, the

[1] *Travelodge Corp. et al.*, Case 21-CA-7694; *Hackney Iron & Steel Co.*, Cases 23-CA-2505, 23-CA-2554; *Kota Division of Dura Corporation*, 18-CA-2419.

Board extended the date of the oral argument to April 23, 1969.

The Board also invited certain interested parties to file briefs *amici curiae* and to participate in oral argument. Briefs were filed by: The Chamber of Commerce of the United States; American Federation of Labor and Congress of Industrial Organizations; International Union, United Automobile, Aerospace and Agricultural Implement Workers; The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America; and the National Federation of Independent Unions. The Chamber of Commerce of the United States, The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and the National Federation of Independent Unions did not choose to participate in the argument. The National Association of Manufacturers declined to either file a brief or participate in the argument.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, the oral arguments, Respondent's motions to reopen the record and the General Counsel's and Charging Party's opposition thereto, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

Briefly, the facts show that Wackenhut performed plant protection services for Lockheed Aircraft Service Company, Ontario International Airport, Ontario, California. On March 8, 1967,[2] the Union was certified as exclusive bargaining representative for all of Wackenhut's full-time and regular part-time plant protection employees. On April 29, Wackenhut and the Union entered into a collective-bargaining agreement effective until April 28, 1970.

Pursuant to its agreement with Wackenhut, Lockheed let the service contract out for bids. On May 15, at a prebid conference attended by several general service contractors including the Respondent, Burns, Lockheed

[2] Hereinafter, all dates refer to 1967 unless otherwise stated.

advised the prospective bidders that Wackenhut's guards were represented by the Union which had a recent Board Certification, and that there was in existence a labor contract between Wackenhut and the Union covering these employees. On May 31, Wackenhut was informed by Lockheed that Respondent would perform the guard services as of July 1.

Prior to its July 1 takeover, Respondent interviewed guards for employment who were at that time employed by Wackenhut. As more fully described by the Trial Examiner, the Respondent assisted the American Federation of Guards in the solicitation of employees Elmer Reitzel, Thomas Ware, Charles Blenkemeier, Harris Camp, Stanley Ganiewski, and Walter Drake. On June 29, Respondent recognized the American Federation of Guards as bargaining representative.

On July 1, when Respondent officially began the guard service duties theretofore performed by Wackenhut, some 27 guards formerly worked at Lockheed in the employ of Wackenhut began work as guard employees of Respondent. In addition, 15 employees of Respondent were transferred from other jobs and began work at Lockheed. Thus, in assuming guard functions at Lockheed, a majority of Respondent's work force was made up of ex-Wackenhut employees, and the nature of the business remained the same.

On July 12, the Union, by letter, made a demand upon Respondent that it recognize the Union as bargaining representative and honor the Union's collective-bargaining agreement with Wackenhut. By letter dated July 24, the Respondent declined recognition. Unfair labor practice charges were then filed which resulted in the issuance of the complaint in the instant proceeding.

The Trial Examiner concluded that Respondent violated Section 8(a)(2) and (1) of the National Labor Relations Act, as amended, by assisting the American Federation of Guards in organizing employees, and by recognizing the American Federation of Guards when it did not represent an uncoerced majority of Respondent's employees. In addition, the Trial Examiner found that Respondent was a successor employer to Wacken-

hut and that it violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the bargaining representative of its employees. We agree with these findings of the Trial Examiner.

We also agree with the Trial Examiner that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to abide by the 1967 contract between Wackenhut and the Union. However, in view of the significance of the issue presented, we believe it is necessary to explicate fully our reasons for doing so.

The Supreme Court's Decision in *John Wiley & Sons v. Livingston*[3] altered the perspective in which a successor employer's obligations to honor the provisions of a collective-bargaining agreement negotiated by his predecessor must be viewed. There, the predecessor employer was absorbed by merger into a larger acquiring company (Wiley). Some of the predecessor's employees were represented by a union, and the collective-bargaining contract, which did not contain a successors clause, was not scheduled to expire until over a year after the merger took place. Pursuant to an arbitation clause in the contract, the union brought suit to compel Wiley to arbitrate its claim that certain contract rights had survived the merger. The Court held that even though the predecessor had disappeared as a result of the merger, all rights of the employees covered by the preexisting collective-bargaining agreement did not terminate. The Court determined that under the circumstances presented Wiley was bound to arbitrate its obligations under the preexisting collective-bargaining agreement.

In reaching its conclusion, the Court specifically rejected the contention that Wiley could not be required to arbitrate under the preexisting collective-bargaining agreement because it was not a party to that agreement and had not consented to be bound by it. The Court stated at 376 U.S., 550:

> While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, (footnote

[3] 376 U.S. 543.

> omitted), a collective bargaining agreement is not an ordinary contract . . . '[I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . The collective bargaining agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.' (Citation omitted) . . . Central to the peculiar status and functions of a collective bargaining agreement is the fact dictated both by circumstances . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship.

As the foregoing indicates, the Supreme Court refused to rely upon common law contract doctrine in determining the nature of a purchasing-employer's obligation to arbitrate matters arising under a contract it had not signed. Rather, the Court construed the contract in the context of a national labor policy which accords a central role to arbitration as "the substitute for industrial strife" and as "part and parcel of collective bargaining itself" and found the necessary contractual foundation for the duty to arbitrate in the contract negotiated by Wiley's predecessor:

> "Therefore, although the duty to arbitrate, as we have said . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy." (376 U.S. 551).

The concept of substantial continuity in the employing industry enunciated as a necessary condition for the

survival of the duty to arbitrate when the ownership of a business changes hands is at the heart of our determination that a purchasing employer is a successor-employer within the meaning of the Act. In essence, the finding of successorship involves a judgment that the employing industry has remained essentially the same despite the change in ownership.[4] A normal consequence of such finding is that the successor-employer is obligated to recognize and bargain with the union duly selected by the employees—albeit prior to the change in ownership—as their collective-bargaining representative. This consequence of successorship is rooted, *inter alia*, in the fact that

> "[i]t is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace . . . . ,"[5]

as well as in the fact that, having chosen a bargaining representative,

> "[t]here is no reason to believe that the employees will change their attitudes merely because the identity of their employer has changed."[6]

Binding the successor-employer to his predecessor's bargaining obligation furthers the policy of protecting the employees' exercise of the right to engage in collective bargaining through representatives of their own choosing. Requiring the successor-employer to negotiate proposed changes in existing terms and conditions of employment with the employees' bargaining representative promotes stability in the employing enterprise's labor relations and furthers the interests of industrial peace. The obligation to bargain imposed on a successor-employer includes the negative injunction to refrain from unilaterally changing wages and other benefits established by a prior collective-bargaining agreement even though that agreement

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[4] See, eg., *Cruse Motors, Inc.*, 105 NLRB 242, 247.

[5] *Kiddie Kover Co.* v. *N.L.R.B.*, 105 F.2d 179, 188 (C.A. 6).

[6] *N.L.R.B.* v. *Albert Armato*, 199 F.2d 800, 803 (C.A. 7).

had expired.[7] In this respect, the successor-employer's obligations are the same as those imposed upon employers generally during the period between collective-bargaining agreements.[8]

The question before us thus narrows to whether the national labor policy embodied in the Act requires the successor-employer to take over and honor a collective-bargaining agreement negotiated on behalf of the employing enterprise by the predecessor. We hold that, absent unusual circumstances, the Act imposes such an obligation.

"The history of the collective bargaining process demonstrates that its object has long been an agreement between employer and employees as to wages, hours and working conditions evidenced by a signed contract or statement in writing, which serves both as recognition of the union with which the agreement has been reached and as a permanent memorial of its terms . . . . [t]he signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife." (*Heinz Co.* v. *N.L.R.B.*, 311 U.S. 514). In enacting the 1947 amendments to the Act, Congress added Section 8(d) in which it defined in some detail the duty to bargain collectively, including within that definition a specific ratification of the holding in the *Heinz* case.

Section 8(d) also defined the duty to bargain as meaning that, "where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce . . . no party to such contract shall terminate or modify such contract", unless it serves prescribed notices on the other party, and maintains its contract in effect for 60 days therefrom, even though that period may extend beyond the contract's natural termination

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[7] *Harold W. Hinson, d/b/a Hen House Market No. 3*, 175 NLRB No. 100, enforced, —— F.2d —— (C.A. 8) (1970). *Overnite Transportation Co.*, 157 NLRB 1185, enfd. 375 F.2d 765 (C.A. 4), cert. denied, 398 U.S. 838.

[8] *Marine & Shipbuilding Workers* v. *N.L.R.B.*, 320 F.2d 615 (C.A. 3).

or expiration date. Section 8(d) also provides that a party to a collective-bargaining agreement has the right to refrain from discussing modifications which are to take effect prior to the period fixed by the contract itself for reopening negotiations. Section 8(d) thus clearly demonstrates Congress' recognition of the paramount role in maintaining industrial peace played by parties' adherence to existing collective-bargaining agreements.

The impressive policy considerations favoring the maintenance and adherence to existing collective-bargaining agreements are not wholly overborne by the fact that Burns has not signed the contract here in issue. Nor can a holding that Burns is obligated to honor and adhere to the express terms of the contract readily be equated with compelling Burns to agree to a bargaining proposal or make a concession it is unwilling to make.[9] Indisputably, there is a contract. That contract covers the employees of the employing industry which Burns took over; it was negotiated on behalf of the employing enterprise by Wackenhut, Burns predecessor. That contract is reasonably related to Burns through its takeover of Wackenhut's Lockheed service functions and its hiring of Wackenhut employees. We find, therefore, that Burns is bound to that contract as if it were a signatory thereto, and that its failure to maintain the contract in effect is violative of Sections 8(d) and 8(a)(5) of the Act.[10]

In the normal case, we perceive no real inequity in requiring a "successor-employer" to take over his predecessor's collective-bargaining agreement, for he stands in the shoes of his predecessor. He can make whatever adjustments the acceptance of such obligation may dictate in his negotiations concerning the takeover of the business. Normally, employees cannot make a comparable adjustment. Their basic security is the collective-bargaining agreement negotiated on their behalf. In the

[9] Section 8(d) provides that performance of the mutual obligation to bargain does not compel either party to agree to a proposal or require the making of a concession.

[10] *C & S Industries, Inc.*, 158 NLRB 454; *N.L.R.B.* v. *Huttig Sash & Door Co.*, 377 F.2d 964 (C.A. 8), enforcing 154 NLRB 811. See also, *Oilfield Maintenance Co., Inc., etc.*, 142 NLRB 1384.

instant case this is certainly so. They work in an industry in which the identity of their employer is subject to annual bidding for the right to perform the services they are engaged in furnishing. The contract involved herein was negotiated for a term of 3 years, but had been in existence for only 2 months at the time of Burns' takeover. Burns had knowledge of the agreement when it bid for the Lockheed service contract. It hired employees on whose behalf the agreement was negotiated. Accordingly, in order to fully protect the employees' exercise of the right to bargain collectively and to promote the maintenance of stable bargaining relationships and concomitantly industrial peace in this industry, we conclude that Respondent Burns must be held bound to its predecessor's contract.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, The William J. Burns International Detective Agency, Inc., Ontario, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, with the qualification described below.[11]

Dated, Washington, D. C.

FRANK W. MCCULLOCH, Chairman

JOHN H. FANNING, Member

GERALD A. BROWN, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

[11] Substitute "Judgment" for "Decree" wherever it occurs in footnote 6 of the Trial Examiner's Recommended Order.

Member Jenkins, dissenting:

My partial dissent is as follows:

There is no requirement in the Act that a successor employer be bound by the collective bargaining agreement in effect when the business is transferred. Whether to require the successor to be bound is therefore a matter of judgment or interpretation of the national labor policy. In the absence of a clear statutory command or binding judicial precedent, I would not impose the existing agreement on either the union or the employer.

Where the enterprise is marginal or faltering, the new management may have to rearrange the terms and conditions of employment if the business and the jobs are to survive. The union also may, as in the companion case of *Kota Division of Dura Corporation*, 182 NLRB No. 51, want the opportunity to alter employment conditions in the light of the new economic circumstances and relations brought into the situation by the new employer. In such cases, our goal should be to permit the parties flexibility in working out their new arrangements if either desires to do so, rather than to impose the existing agreement when one side may be seriously dissatisfied with it. The new employer is not a party to the agreement, and the union did not join in shaping and executing it with his circumstances in mind. Thus, to impose the agreement on the new relation may in many cases prove a source of friction and disruption, rather than the stability for which my colleagues hope.

Section 8(d) of the Act, in requiring "parties" to adhere to their agreements and give notice of termination well in advance, hardly supports the conclusion that the successor is bound by the agreement; for that section refers only to a "party" to the contract, the successor is not a party, and the issue before us is whether he should be treated as if he were a party.

Unlike my colleagues, who rely principally on *John Wiley and Sons* v. *Livingston* to require that the existing agreement must continue in effect beyond the transfer of the business, I see little in that case to support that conclusion. The employees' rights at issue there

were of a very narrow range, such as seniority, vacation pay, pension contributions and severance pay, rights which were fixed or already accrued by being, at least in part, earned through past performance of work, or "vested" as the Court referred to them. The Court held only that the arbitration clause in the old agreement survived the merger as an available method of resolving issues concerning these "vested" rights. This hardly amounts to a holding that the entire old agreement must be imposed on the new employment relation. Indeed, the Court's approval of arbitration and its inherent flexibility and adjustment to unforeseen circumstances might indicate that the old agreement should not be so imposed.

Accordingly, I would not hold that Burns is bound by the agreement between its predecessor, Wackenhut, and the Union.

Dated, Washington, D. C.

HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case No. 31-CA-776

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.

and

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162

and

AMERICAN FEDERATION OF GUARDS, LOCAL 1, PARTY IN INTEREST

Gerald Goldman and *Clifford L. Hardy, Esqs.*, of Los Angeles, Calif., for the General Counsel.

O'Melveny & Myers, by *Charles G. Bakaly, Jr.* and *Seymour Swerdlow, Esqs.*, of Los Angeles, Calif., for the Respondent.

Livingston, Gregory, Van Lopik & Higle, by *Gordon A. Gregory, Esq.*, of Detroit, Mich., for the Charging Party.

TRIAL EXAMINER'S DECISION

Statement of the Case

E. DON WILSON, Trial Examiner: The original charge was filed on July 24, 1967, by International Union, United Plant Guard Workers of America and its Amalgamated Local Union, No. 162, herein the Union, and an amended charge was filed on August 1, 1967. Upon the charge as amended, the General Counsel of the National Labor Relations Board, herein the Board, issued a complaint and notice of hearing dated October 25, 1967, alleging that The William J. Burns Interna-

tional Detective Agency, Inc., herein Respondent, had violated Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act, herein the Act.

Pursuant to due notice, a hearing in this matter was held before me in Los Angeles, California, on December 19 and 20, 1967. All parties but the party in interest fully participated. Briefs for the General Counsel, Respondent, and Charging Party have been received and considered.

Upon the entire record [1] in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. Respondent's Business

At all material times, Respondent has been a New York corporation with offices in various parts of the United States, including an office at Los Angeles, California, where it is engaged in providing protective, guard, and detective services to business firms throughout the United States.

In the course and conduct of its business operations, Respondent's Los Angeles office has an annual volume of business in excess of $500,000, and annually performs services valued in excess of $50,000 for firms outside the State of California, and annually performs services valued in excess of $50,000 for firms in the Los Angeles area, each of which ships products valued in excess of $50,000 directly outside the State of California.

The Wackenhut Corporation, herein Wackenhut, is a Florida corporation engaged in plant protection and security services for firms located throughout the United States. In the course and conduct of its business operations, Wackenhut has an annual gross volume of business in excess of $500,000, and it annually performs services valued in excess of $50,000 outside Florida.

Respondent and Wackenhut, each, is and at all material times has been, an employer engaged in commerce within the meaning of the Act.

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[1] The motion to correct the transcript is granted as is the motion to admit Respondent's Exhibit No. 5 into evidence.

II. The Labor Organizations

The Union, and American Federation of Guards, Local 1, herein AFG, are labor organizations within the meaning of the Act.

III. The Unfair Labor Practices

A. *The Issues*

The issues include the following:

(1) Is Respondent a successor to Wackenhut;

(2) Is a unit limited to employees of Respondent at Lockheed, appropriate;

(3) Has Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and by refusing to give effect to a contract between Wackenhut and the Union;

(4) Has Respondent violated Section 8(a)(2) and (1) of the Act by recognizing AFG as the bargaining representative of Respondent's employees at Lockheed and by requiring membership in or an application for membership in AFG as a condition of employment at Lockheed;

(5) Did Respondent violate Section 8(a)(1) and (2) of the Act by promising and giving an employee a promotion and a raise because he assisted the AFG; and

(6) Did Respondent violate Section 8(a)(2) and (1) of the Act by assisting AFG in organizing Respondent's employees and by recognizing AFG when AFG did not represent an uncoerced majority of Respondent's employees?

B. *Respondent, Wackenhut and the Appropriate Unit*

At least beginning February 28, 1967,[2] Wackenhut performed plant protection services for Lockheed Aircraft Service Company, herein Lockheed, at Ontario International Airport. On this date, a majority of the employ-

[2] Hereinafter all dates refer to 1967 unless otherwise stated.

ees in the following unit selected the Union as their bargaining representative in a Board election. The unit is:

> All full-time and regular part-time employees of Wackenhut performing plant protection duties as determined in Section 9(b)(3) of the Act at Lockheed, Ontario International Airport; excluding office clerical employees, professional employees, supervisors, and all other employees as defined in the Act.

On March 8, the Regional Director certified the Union as the exclusive bargaining representative of the employees in the above unit.

On April 29, Wackenhut entered into a collective-bargaining contract with the Union to be effective until April 28, 1970. It contained a legal union security provision.

As provided by the agreement between Lockheed and Wackenhut, Lockheed let the service contract out for bids. On May 15, Lockheed advised Respondent that Wackenhut's guards were represented by the Union which had a contract after Board certification. On May 31, Wackenhut was told by Lockheed that Respondent would perform the guard services as of July 1. Wackenhut ceased performing the guard services and Respondent began performing the guard services for Lockheed. On July 1, Respondent's employees included 27 guards formerly employed by Wackenhut and 15 transferred employees of Respondent.

C. *Respondent Assists the AFG*

1. Reitzel

Elmer H. Reitzel was formerly an employee of Wackenhut. He was "Chairman of the Board" of the Wackenhut employees. About June 2, Major George Goddard, a supervisor of Respondent, interviewed Reitzel and gave him a job application. A few days later, Reitzel spoke to Mr. New, Respondent's Operations Manager, and a supervisor, about the job. New told Reitzel to see

Jack Foley, an organizer for the AFG. Foley was seated from 15 to 30 feet away from New, in the same room. Foley gave Reitzel an AFG authorization card to sign and said employees had to belong to the AFG to work for Respondent, but Reitzel did not then sign it. Foley said Respondent couldn't live with the Union's contract. Reitzel asked for a copy of the AFG contract but did not get one. Foley told Reitzel that as steward he would like to have him get the employees to sign authorization cards for the AFG. Reitzel said he'd talk to the employees. Reitzel left and then called a representative of the Union in Detroit. Reitzel told the representative Respondent and AFG wanted the employees to sign authorization cards to keep their jobs. The representative said it was all right if it meant their jobs. Foley mailed pledge cards to Reitzel. About 2 days later, Foley came to Reitzel and spoke to him about the cards. I have carefully studied Reitzel's testimony and find it is confused as to dates. I am convinced that Reitzel just did not remember when Goddard told Reitzel Respondent was considering promoting him to sergeant. Foley asked Reitzel if he had gotten authorization cards, which Foley had given him, signed. Reitzel said he was working on them. In the latter part of June, Goddard phoned Reitzel and asked him to bring the signed pledge cards to Respondent's office. Reitzel failed to do so. About 10 o'clock that evening, Captain Kretzlow, a supervisor, came to Reitzel's home and asked for the signed AFG cards and Reitzel explained that he didn't have them with him. The next morning at work, Goddard came to Reitzel and picked up the AFG cards.[3]

When Respondent took over Wackenhut's operations, Reitzel was promoted from guard to sergeant with a raise from $1.75 to $1.95 an hour with no additional obligations. There is insufficient probative evidence that Reitzel was promised the promotion or was promoted to sergeant in violation of Section 8(a)(1) or (2) of the Act. Reitzel's recollection of when he was told he would be promoted to sergeant is too confused to permit a finding.

[3] The record makes clear there were about 18.

Respondent violated Section 8(a)(2) and (1) of the Act by New's direction to Reitzel to see Foley who as part of the hiring procedure told Reitzel he had to sign an AFG pledge card to work for Respondent and asked him to get other employees to sign for the AFG. Respondent similarly violated the Act by Goddard's request of Reitzel that he bring the signed AFG cards to Respondent's office and by Kretzlow's asking for the cards and by Goddard picking them up from Reitzel at work.

2. Thomas C. Ware

Ware was employed by Wackenhut as a guard. In early June, he went to Respondent's office wtih a filled out application for employment by Respondent. He gave his application to New. He told New he would like to know about pay and about hospitalization and other details. New directed him to Foley for answers. He saw Foley in the same room. Foley gave him no answers. Foley repeatedly pushed an AFG authorization card in front of Ware and told him the Union was out and that he had to sign the AFG card or not work for Respondent. Ware said that "in California" he had 30 days to make up his mind.

I find Respondent violated Section 8(a)(2) and (1) of the Act by New's assisting Foley in his solicitation for the AFG, of Ware.

3. Charles A. Blankemeier

On June 28, Blankemeier received an application for employment. The next day he returned the application when he went to Respondent's office to pick up a uniform. He saw Goddard and Kretzlow and asked for his uniform. As he was preparing to leave with his new uniform, Goddard told him he had to sign an AFG authorization slip before he could have Respondent's uniform. He signed the AFG slip with Foley's name on it and left with the uniform.

I find Respondent violated Section 8(a)(2) and (1) of the Act by conditioning his receipt of Respondent's uniform, necessary for work with respondent, on his signing an AFG authorization card.

4. Harris K. Camp

About June 10, Camp went to Respondent's office for an application. He saw Goddard. Goddard told him to go into the next room. Camp did so and found Foley to be the only one there. Foley told him Respondent now had the contract and if Camp wanted to work for Respondent he would have to sign the AFG card. Foley handed him a card and Camp said he would think it over. He left and again saw Goddard who gave him a work application. The next day Camp brought this application back to Goddard. He was measured for Respondent's uniform. A couple of weeks later, on June 30, he went in to pick up his uniform and on top of it was an AFG union slip that was supposed to be signed by him. In the presence of Goddard, Kretzlow gave him the AFG slip to sign. He said it had to be signed. It was in with the paper work for the clothing.

I find Respondent, through Goddard and Kretzlow, assisted the AFG in signing up Camp, in violation of Section 8(a)(2) and (1) of the Act.

5. Stanley L. Ganiewski

Ganiewski was a Wackenhut guard who went to Respondent's office for employment about June 10. He saw Goddard and asked where the applications were. Goddard pointed to a room. Ganiewski went there and found Foley there alone. Foley told him he'd have to join the AFG to work for Respondent. Foley spoke at length about the AFG and its contract. He asked Ganiewski to sign an AFG authorization card. The latter said he'd think about it and left.

I find Respondent, through Goddard, assisted the AFG in its solicitation of Ganiewski through Foley, in violation of Section 8(a)(2) and (1) of the Act.

6. Walter Drake

In the latter part of June, Drake went to Respondent's office and talked to Goddard and some captain. The captain brought to him an authorization card of the

AFG and said he would have to sign it before he could go to work. He said it was for "their union." Drake said he had 30 days to sign the card. They said he would have to sign it before he could go to work. Later that day, Goddard told him he had 30 days to sign but Respondent would like to have the AFG authorization signed before he went to work. Drake signed the card.

Respondent, through Goddard and the captain, assisted the AFG in its organizing activities in connection with Drake and thereby violated Section 8(a)(2) and (1) of the Act.

C. *Respondent is a Successor to Wackenhut and Obligated to Bargain With the Union*

When Respondent began its operations at Lockheed during the certification year, and during the contract term, it performed the same operations at Lockheed as had Wackenhut. It had in its employ a majority of Wackenhut's former employees. There has been a substantial continuity of Wackenhut's business operations by Respondent. At least substantially the same business facilities have been used. The working conditions are substantially the same. The services provided are substantially the same. Respondent's taking over Wackenhut's operations at Lockheed constituted no change in the "employing industry forming the appropriate bargaining unit for which the Union had been certified." *Maintenance, Incorporated*, 148 NLRB 1299. As in *Maintenance*, "Respondent commenced the performance of substantially the identical operations that had theretofore been performed by [Wackenhut], servicing the same facilities for the same customers in substantially the same manner and at the same work site, and utilizing for that purpose a former [Wackenhut] work force to perform the same functions and exercise the same skills."

Respondent had the duty to honor its employees' choice of a bargaining representative, the Union. This was a public obligation not arising from private contract. The Union "was entitled to statutory recognition at the time Respondent took over." *Maintenance, Incorporated, supra.*

It is clear "that Respondent assumed the obligation the Act imposes upon an employer to recognize and deal with its employees' majority representative when it selected as its work force the employees of the previous employer to perform the same tasks at the same place as they had in the past. These employees had already expressed their choice of bargaining representative, and continued to constitute an appropriate bargaining unit. As the certification year had not yet expired at the time the Union sought recognition and bargaining,[4] the presumption of the Union's continuing majority status applied and was not then vulnerable to attack." *Maintenance, Incorporated, supra.* Respondent was obligated to recognize and bargain with the Union as the statutory representative of its employees in an appropriate unit. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to comply with the Union's July 12 demand for bargaining. It has been found that Respondent knew, when it bid for the Lockheed contract, that the Union was the certified bargaining representative.

Respondent challenges the appropriateness of the bargaining unit as applied to Wackenhut and as applied to Respondent. While a broader unit might have been appropriate, I find a unit of guards limited to a single facility is an appropriate unit. Here the certification was pursuant to a consent election agreement. There is no evidence that the Regional Director was arbitrary or capricious. A mere change of employers does not destroy the certification.

D. *Respondent Violated Section 8(a)(2) and (1) By Recognizing the AFG*

As has heretofore been found, the AFG did not represent an uncoerced majority of Respondent's employees on or before July 1, when Respondent recognized the AFG. Consequently, Respondent assisted AFG in violation of Section 8(a)(2) and (1) of the Act when it recognized the AFG as bargaining representative.

---

[4] July 12.

E. *Respondent Violated Section 8(a)(5) and (1) of the Act By not Honoring and Assuming and Doing Business Under the Contract Between the Union and Respondent's Predecessor, Wackenhut*

On April 29, the Union and Wackenhut entered into a collective-bargaining agreement covering Wackenhut's Lockheed employees, the contract to be effective until 1970.

While *Wiley* v. *Livingston*, 376 U.S. 543, dealt specifically only with the obligation of a successor employer to arbitrate under a contract with a union, the decision made clear that the rights of employees under a collective-bargaining agreement are not automatically terminated by the fact that one employer succeeds to the rights of another employer. The Court was concerned with whether, as here, the business remains the same. The Court recognized that employees do not ordinarily take part in negotiations, leading to changes in corporate ownership. The well being of employees is at best incidental to the negotiations. The Court held, "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." The Court emphasized that a collective-bargaining agreement is not an ordinary contract.

The Union persuasively argues that in an industry of the nature here involved where the employer may be changed from year to year, the union contract should follow the unit rather than the employer. The employees may select a union which obtains a contract for their benefit and find the employer changes. If the new employer may ignore the contract, all negotiations for peaceful contractual relations come to naught. Here, if Respondent does not assume and honor the contract, economic stability is destroyed. To leave Respondent free to bargain from scratch and ignore the common law of the employing industry is to leave an industry such as this to contracts of no substance or meaning.

The *Wiley* reasoning has been applied in a situation very similar to the instant case. *Wackenhut Corporation* v. *International Union, United Plant Guard Workers of America*, 332 F.2d 954 (C.A. 9). There the court found that where, as here, there is a "substantial similarity of operation and continuity of identity of the business enterprise before and after the change in ownership," the successor employer is bound by the entire contract of the predecessor.

I find that Respondent by refusing to honor the contract between Wackenhut and the Union, refused to bargain in violation of Section 8(a)(5) and (1) of the Act since on or about July 24.[5]

IV. The Effect of the Unfair Labor Practices

The activities of Respondent set forth in section III, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States, leading to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

Upon the foregoing findings of fact and the entire record in the case, I make the following conclusions of law:

1. Respondent and Wackenhut are employers engaged in commerce within the meaning of the Act.
2. AFG and the Union are labor organizations within the meaning of the Act.
3. All full-time and regular part-time employees of Respondent performing plant protection duties as determined in Section 9(b)(3) of the Act at Lockheed, Ontario International Airport; excluding office clerical employees, professional employees, supervisors, and all other employees as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

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[5] Cf. *Michaud Bus Lines, Inc.*, 171 NLRB No. 21.

4. By failing and refusing on July 24, and thereafter, to recognize and bargain with the Union as the exclusive bargaining representative of Respondent's employees in the above-described appropriate unit and by failing to honor and adopt and enforce the existing contract between Wackenhut and the Union, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. By assisting AFG in obtaining representation among its employees and by recognizing AFG as the exclusive bargaining representative of its employees at a time when AFG did not represent an uncoerced majority of Respondent's employees, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (2) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1), (2), and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent be ordered to withdraw and withhold recognition from AFG unless and until that union is certified, in order to enable its employees to exercise their statutory rights free from the unfair labor practices engaged in by Respondent.

It has been found that the Union is the certified bargaining representative of Respondent's employees in an appropriate unit and requested recognition and bargaining, the same being unlawfully refused, I shall recommend that Respondent bargain, upon request, with the Union and, if any understanding is reached, embody such understanding in a signed agreement. It has further been found that there is in existence a contract between Respondent, as successor to Wackenhut, and the

Union. I shall recommend that Respondent honor, adopt and enforce that contract. I shall also recommend that Respondent give retroactive effect to all the clauses of the contract and make whole, with 6 percent interest, employees for any losses suffered by reason of Respondent's refusal to adopt, honor and enforce the agreement.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record herein, it is recommended that Respondent, its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively, upon request, with the Union as the exclusive bargaining representative of its employees in the above-described unit.

(b) Refusing to adopt, honor and enforce its contract with the Union, as successor of Wackenhut.

(c) Assisting or recognizing AFG as the representative of its employees for the purposes of collective bargaining, unless and until said labor organization shall have been certified as the exclusive bargaining representative of said employees in an appropriate unit.

(d) Interfering with representation of its employees through labor organizations of their own choosing.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to join or assist the Union or otherwise engage in activities protected by the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Withdraw and withhold recognition from AFG until or unless it is certified as bargaining representative of Respondent's employees in an appropriate unit.

(b) Bargain collectively, upon request, with the Union and, if any understanding is reached, embody such understanding in a signed agreement.

(c) Honor, adopt and enforce the contract between Respondent, as successor to Wackenhut, and the Union

and give retroactive effect to all the clauses of said contract, and, with interest of 6 percent, make whole its employees for any losses suffered by reason of Respondent's refusal to honor, adopt and enforce said contract.

(d) Post at its Lockheed, Ontario, California, operations copies of the notice attached hereto as "Appendix."[6] Copies of said notice, to be furnished by the Regional Director for Region 31, shall after being signed by Respondent's authorized representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by any other material.

(e) Notify said Regional Director, in writing, within 20 days from the date of the receipt of this Recommended Order what steps Respondent has taken to comply herewith.[7]

Dated:

/s/ E. Don Wilson
E. DON WILSON
Trial Examiner

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[6] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[7] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL
EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(AS AMENDED)

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively, upon request, with International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 as the exclusive bargaining representative of our employees in the following appropriate unit:

> All our full-time and regular part-time employees performing plant protection duties as determined by Section 9(b)(3) of the National Labor Relations Act, at Lockheed, Ontario International Airport; excluding office clerical employees, supervisors, and all other employees as defined in the Act.

WE WILL NOT refuse to adopt, honor and enforce our contract, as successor of Wackenhut, with the above-named Union and covering the above-described unit.

WE WILL NOT assist or recognize American Federation of Guards, Local 1, as the representative of our employees for the purposes of collective bargaining, unless and until it shall have been certified as the exclusive bargaining representative of our employees in the above unit.

WE WILL NOT interfere with representation of our employees through labor organizations of their own choosing.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights to join or assist the United Plant Guard Workers or otherwise engage in activities protected by the Act.

WE WILL withdraw and withhold recognition from American Federation of Guards until or unless it is certified as bargaining representative of our employees in an appropriate unit.

WE WILL bargain, upon request, with United Plant Guard Workers and, if any understanding is reached, embody such understanding in a signed agreement.

WE WILL, as successor to Wackenhut, honor, adopt and enforce our collective-bargaining contract with United Plant Guard Workers and give retroactive effect to all clauses of said contract and, with interest at 6 percent, make whole our employees for any losses suffered by reason of our refusal to honor, adopt and enforce said contract.

THE WILLIAM J. BURNS
INTERNATIONAL DETECTIVE
AGENCY, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 10th Floor, Bartlett Building, 215 West Seventh Street, Los Angeles, California, 90014, Telephone No. 688-5850.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D. C.

Case No. 31-CA-776

In the Matter of the
WILLIAM J. BURNS INTERNATIONAL
DETECTIVE AGENCY, INC.

and

INTERNATIONAL UNION, UNITED PLANT GUARDS
WORKERS OF AMERICA AND ITS AMALGAMATED
LOCAL NO. 162

and

AMERICAN FEDERATION OF GUARDS, LOCAL 1,
PARTY IN INTEREST

MOTION TO REOPEN RECORD

Pursuant to Section 102.48(d) of the Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Respondent, William J. Burns International Detective Agency, Inc., by its counsel, respectfully moves that the record in this matter be reopened for the purpose of admitting additional evidence. In support thereof, counsel for the Respondent, shows as follows:

1. On December 18, 1967, the Respondent, Counsel for the General Counsel, and the charging party, United Plant Guard Workers of America, entered into a stipulation which was entered in evidence as General Counsel Exhibit No. 3 before the Trial Examiner.

Paragraph 8 of said stipulation provides as follows:

> "On July 1, 1967, when Respondent officially began guard service, some twenty-seven (27) guards formerly working at Lockheed Aircraft Service Company, Ontario International Airport, Ontario, Cali-

fornia, in the employ of the Wackenhut Corporation began working as guard employees of Burns; and, concurrently, fifteen (15) employees of Burns, who were transferred from other Burns jobs, also began working at Lockheed. At present Respondent employs twenty-one (21) former Wackenhut employees, twenty-three (23) Burns employees who were transferred from other Burns jobs, and eight (8) new hires."

2. Briefly stated, the evidence that Respondent seeks to place in the record is as follows:

On December 31, 1968, Respondent employed, at Lockheed Aircraft Service Company, thirteen (13) former Wackenhut employees, thirty-two (32) of Respondent's employees who were transferred from other jobs of the Respondent, and four (4) new hires. (Of the thirteen (13) former Wackenhut employees employed on December 31, 1968, only nine (9) worked on a full time basis.)

3. The facts set forth in paragraph 2 above, which have changed since the date of the stipulation of December 18, 1967, are highly relevant to the following contentions of the Respondent;

(a) Respondent is not successor to Wackenhut because there has been no continuity of the employing industry;

(b) There has been a failure to prove the factors necessary to establish successorship;

(c) It would be improper, in view of the high degree of turnover and the fact that such a small percentage of former Wackenhut employees are still employed by the Respondent, to order Respondent to recognize, without an election, the United Plant Guard Workers as the exclusive bargaining representative for its employees;

(d) Respondent is not bound by the collective bargaining agreement between Wackenhut and the United Plant Guard Workers;

(e) A bargaining unit consisting of only Respondent's employees at Lockheed is not appropriate; and

(f) The other contentions set forth in Respondent's Brief in support of Exceptions to the Trial Examiner's Decision.

WHEREFORE, Respondent requests the National Labor Relations Board reopen the record in the instant matter for the purpose of admitting additional evidence.

Respectfully submitted

O'MELVENY & MYERS
SEYMOUR SWERDLOW

By /s/ Seymour Swerdlow
SEYMOUR SWERDLOW
Attorneys for Respondent

Dated: January 9, 1969.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D. C.

Case No. 31-CA-776

In the Matter of The
WILLIAM J. BURNS INTERNATIONAL
DETECTIVE AGENCY, INC.

and

INTERNATIONAL UNION, UNITED PLANT GUARDS
WORKERS OF AMERICA AND ITS AMALGAMATED
LOCAL NO. 162

and

AMERICAN FEDERATION OF GUARDS, LOCAL 1,
PARTY IN INTEREST

MOTION TO REOPEN RECORD

Pursuant to Section 102.48(d) of the Rules and Regulations and Statements of Procedure of the National Labor Relations Board, Respondent, The William J. Burns International Detective Agency, Inc., by its counsel, respectfully moves that the record in this matter be reopened for the purpose of admitting additional evidence. In support thereof, counsel for the Respondent, shows as follows:

1. On December 18, 1967, the Respondent, Counsel for the General Counsel, and the charging party, United Plant Guard Workers of America, entered into a stipulation which was entered in evidence as General Counsel Exhibit No. 3 before the Trial Examiner.

Paragraph 8 of said stipulation provides as follows:

> "On July 1, 1967, when Respondent officially began guard service, some twenty-seven (27) guards formerly working at Lockheed Aircraft Service Company, Ontario International Airport, Ontario, Cali-

fornia, in the employ of the Wackenhut Corporation began working as guard employees of Burns; and, concurrently, fifteen (15) employees of Burns, who were transferred from other Burns jobs, also began working at Lockheed. At present Respondent employs twenty-one (21) former Wackenhut employees, twenty-three (23) Burns employees who were transferred from other Burns jobs, and eight (8) new hires."

2. Briefly stated, the evidence that Respondent seeks to place in the record is as follows:

On October 31, 1969, Respondent employed, at Lockheed Aircraft Service Company, nine (9) former Wackenhut employees, eighteen (18) of Respondent's employees who were transferred from other jobs of the Respondent, and two (2) new hires. (Of the nine (9) former Wackenhut employees employed on October 31, 1969, only seven (7) worked on a full time basis.)

3. The facts set forth in paragraph 2 above, which have changed since the date of the stipulation of December 18, 1967, are highly relevant to the following contentions of the Respondent;

(a) Respondent is not successor to Wackenhut because there has been no continuity of the employing industry;

(b) There has been a failure to prove the factors necessary to establish successorship;

(c) It would be improper, in view of the high degree of turnover and the fact that such a small percentage of former Wackenhut employees are still employed by the Respondent, to order Respondent to recognize, without an election, the United Plant Guard Workers as the exclusive bargaining representative for its employees; or to honor the collective bargaining agreement between the United Plant Guard Workers and Wackenhut;

(d) Respondent is not bound by the collective bargaining agreement between Wackenhut and the United Plant Guard Workers;

(e) A bargaining unit consisting of only Respondent's employees at Lockheed is not appropriate; and

(f) The other contentions set forth in Respondent's Brief in support of Exceptions to the Trial Examiner's Decision.

WHEREFORE, Respondent requests the National Labor Relations Board reopen the record in the instant matter for the purpose of admitting additional evidence.

Respectfully submitted

O'MELVENY & MYERS
SEYMOUR SWERDLOW

By /s/ Seymour Swerdlow
SEYMOUR SWERDLOW
Attorneys for Respondent

DATED: November 19, 1969.

[Tr. p. 1.] BEFORE THE
NATIONAL LABOR RELATIONS BOARD
THIRTY-FIRST REGION

Case No. 31-CA-776

IN THE MATTER OF
THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., RESPONDENT

and

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162, CHARGING PARTY,

and

AMERICAN FEDERATION OF GUARDS, LOCAL 1, PARTY IN INTEREST

Hearing Room #1
215 West Seventh St., 9th Floor,
Los Angeles, California
December 19, 1967

The above-entitled matter came on for hearing, pursuant to notice, at 10:30 o'clock, a.m.

BEFORE: E. DON WILSON, ESQ., Trial Examiner.

APPEARANCES:

GERALD GOLDMAN, ESQ., CLIFFORD L. HARDY, ESQ., 215 West 7th St., Los Angeles, California, appearing on behalf of the General Counsel.

LIVINGSTON, GREGORY, VAN LOPIK & HIGLE, By: GORDON A. GREGORY, ESQ., 2140-2144 First National Bldg., Detroit, Michigan, appearing on behalf of the Charging Party.

O'MELVENY & MYERS, By: CHARLES G. BAKALY, JR., ESQ., and SEYMOUR SWERDLOW, ESQ., 433 S. Spring Street, Los Angeles, California, appearing on behalf of the Respondent.

[Tr. p. 3.] PROCEEDINGS

[Tr. p. 4.] [By Mr. Goldman] I have had marked as General Counsel's Exhibit No. 1 the formal papers in this proceeding, and all parties have had an opportunity to examine them, and I hereby offer into evidence [Tr. p. 5.] General Counsel's Exhibit No. 1, formal documents.

TRIAL EXAMINER: Any objection?

MR. GREGORY: No objection.

MR. SWERDLOW: No objection.

TRIAL EXAMINER: Without objection, General Counsel's Exhibit No. 1(a) through (r) for identification is received in evidence.

(The above-referred to documents were marked General Counsel's Exhibits No. 1(a) through 1(r) for identification, and were received in evidence.)

[Tr. p. 10.] MR. SWERDLOW: Well, I do want to be heard. One thing that is not in stipulation which parties are prepared to stipulate on, and I would like to offer the following stipulation. That is, that, one, the election between Wackenhut and the United Plant Guard Workers was held pursuant to stipulation agreement which went into the appropriateness of the bargaining unit. I would like to further stipulate that after the election was conducted that there were no objections to the election and the union was certified on the basis of the tally of ballots. There never has been any hearing on the appropriateness of the unit.

[Tr. p. 11.] TRIAL EXAMINER: I assume that you will so stipulate?

MR. GOLDMAN: Yes, I will.

TRIAL EXAMINER: Do you so stipulate?

MR. GREGORY: Yes, sir.

TRIAL EXAMINER: The stipulation is accepted. However, this was certification based upon a stipulation—

MR. SWERDLOW: Now, I would like to make a brief opening statement, please.

TRIAL EXAMINER: Please do so.

MR. SWERDLOW: I think that you probably have a good, sufficient grasp of the facts, what happened. I will

tell you what we are going to urge. First, we are going to urge that the underlying certification of the Wackenhut unit was improper and that the unit at Wackenhut was not an appropriate bargaining unit and that certification has no force and effect. Second, we are going to urge and prove that the Lockheed operation in which guard services are performed, to which this hearing is related, is not an appropriate unit with respect to Burns' operation. Burns has a large—Burns, that is, the Respondent, has a large operation in this area, which the Lockheed facility forms a small part of, and the only appropriate unit that Burns can be ordered to bargain in is a unit that includes all of its operations in this area. If this was an initial "R" case, we would urge that the unit at Lockheed was inappropriate, and we will demonstrate it. [Tr. p. 12.] At this point, our argument is similar to the accretion cases.

TRIAL EXAMINER: To what is it similar?

MR. SWERDLOW: Accretion cases. A small plant and an addition was made to the plant or added on a different facility and now it becomes a party of the original bargaining unit.

So, based on those two arguments, we will urge that Burns not be ordered to bargain with the United Plant Guard Workers of America.

Secondly, there is no existing case that I could find, and I believe there is none, where employer who is a successor has ever been found to be bound by a pre-existing contract of the predecessor. I think that new law is attempted to be made here, and this attempt should be turned back as entirely contrary to the policy of the Act. At any rate, we should not be required and cannot be required to honor a contract between Wackenhut and Burns. As far as the specific allegations are concerned, we will be able to prove they were not true. If there was anything, it is not of a nature that constitutes an unlawful act.

TRIAL EXAMINER: Mr. Goldman.

MR. GOLDMAN: Yes, sir.

TRIAL EXAMINER: You do take the position, do you not, the refusal by the William J. Burns International Detective Agency to recognize and enforce the con-

tract between the Charging Party and Wackenhut is in itself improper; is this [Tr. p.13.] the position you take?

MR. GOLDMAN: Yes.

TRIAL EXAMINER: Are there cases that so hold?

MR. GOLDMAN: I haven't found any, except for, I believe, Wackenhut's Case in the 9th Circuit, which, I believe, said something to the effect that monitoring contracts—

TRIAL EXAMINER: What it said—

MR. SWERDLOW: That Wackenhut case was not an NLRB case. It was a case between two private parties, and actually involved arbitration under a collective bargaining agreement. It was based on the Wiley Case of the Supreme Court, where there was a similar issue before the court, which said that the successor was required to arbitrate under the predecessor's contract, and that's all that that case does.

I would like to address myself to Mr. Goldman's statement that he objects to any information concerning Wackenhut's certification. We have an absolute right to look at that certification. We were never a party to certification. There was never a hearing on the bargaining unit, and to disallow evidence on that issue is clearly wrong and deprives us of our rights to a full hearing at this stage of the proceeding.

[Tr. p. 15.] MR. GOLDMAN: Yes, we have two stipulations marked as General Counsel's Exhibits No. 2 and 3, marked for identification, and I offer them in evidence.

TRIAL EXAMINER: You are offering them into evidence?

MR. GOLDMAN: Offering them into evidence.

TRIAL EXAMINER: Any objections?

MR. SWERDLOW: No.

TRIAL EXAMINER: Without objections, General Counsel's Exhibits No. 2 and 3 are received in evidence.

(The above-referred to documents were marked General Counsel's Exhibit No. 2 and 3 for identification and were received in evidence.)

ELMER H. REITZEL

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Goldman) Mr. Reitzel, were you employed by Wackenhut Corporation?
[Tr. p. 16.] A I was, sir.
Q During what period of time did you work for Wackenhut?
A From September until the termination of their contract.
Q When was that?
A In July.
Q What type of work were you hired for?
A As guard.
Q Plant guard?
A Plant guard.
Q On or about June 2, 1967, did you have the occasion of being interviewed about going on Burns' payroll?
A I was.
Q Who interviewed you?
A Major Goddard.
Q (By Mr. Goldman) What occurred when you met with Mr. Goddard?
A He gave me an application and took the size for my uniform.
[Tr. p. 17.] Q (By Mr. Goldman) What did you do with the application?
A I returned it to their office?
Q When?
A Oh, approximately two days later.
Q Had you or had you not filled it out?
A I had filled it out.
Q Did you have a conversation?
A No, I didn't.
Q What occurred when you returned your application to Major Goddard?

A Well, there wasn't anything at that particular time, as I remember.

Q Did you ever have a conversation with anyone from the Burns' L. A. office?

A Mr. New.

[Tr. p. 18.] Q (By Mr. Goldman) When did you have this conversation with Mr. New?

A Oh, approximately three or four days later after I filled out my application.

Q After you filled out your application. Where did this conversation take place?

A At Ontario Airport office.

Q Where is this airport office?

A In Ontario, the terminal building.

Q At the terminal building. You say you had a conversation; then what occurred?

A Well, he just told me to go across the table and see the gentleman over there.

Q Did that gentleman identify himself to you?

A He was Mr. Foley.

Q At this time when Mr. Foley identified himself to you, did Mr. New stay in the room?

A He did.

[Tr. p. 19.] Q Did you have a conversation with Mr. Foley?

A I did.

Q What was said?

A He gave me one of his pledge cards to sign, and I didn't sign it at that particular time. I asked him if I could see the new contract he has. He said he only had one. I told him I didn't want to sign the pledge card at that particular time.

Q Did he say anything else to you?

A Well, he understood I was chairman of the board of our union, and he said he would like to have the boys sign those pledge cards.

Q Did you say something to him?

A I said to him, "I will go back and talk to them."

Q Did he say anything after you told him you were going to go back and talk to the boys?

A No, he didn't that particular time.

TRIAL EXAMINER: Who is Mr. New?

THE WITNESS: He was supposed to be the assistant manager.

TRIAL EXAMINER: Of what, Lockheed?

THE WITNESS: No, of Burns.

TRIAL EXAMINER: Burns. Who is Mr. Foley?

THE WITNESS: Foley was representative of the American Federation of Guards union.

Q (By Mr. Goldman) After your conversation with Mr. Foley, [Tr. p. 20.] did you have occasion to contact anyone from United Plant Guard Workers of America?

THE WITNESS: Yes, I talked to a representative from our union.

Q (By Mr. Goldman) What did you tell him?

TRIAL EXAMINER: Who was it, when was it, where was it, who else was present?

THE WITNESS: John Gillman who was in Detroit at the time; I talked to him by phone.

THE WITNESS: In June.

Q (By Mr. Goldman) Was this after your conversation with Foley?

A That's right, after Foley.

Q Then what did you talk about—

MR. SWERDLOW: Object, when did he talk to him.

MR. GOLDMAN: Well, I believe the record will show he said this was approximately three days after he signed his application.

TRIAL EXAMINER: That's when he spoke to New. All we have is this conversation with somebody in Detroit or wherever [Tr. p. 21.] it is, he said it took place sometime after that conversation with New, sometime in June. But about how long after your conversation with New—

THE WITNESS: About three or four days later.

TRIAL EXAMINER: All right.

Q (By Mr. Goldman) What did you tell Gillman?

A I told Gillman that they wanted us to sign pledge cards and in order to work there we had to do that, and he instructed me to say that it's O.K. for them to sign them, if it's going to mean your job, you'll keep your job.

Q Now, after this conversation with Mr. Gillman, did you call Jack Foley?

A I talked to Jack Foley and I told him again that he could not get into the compound and into Lockheed, that I would take these pledge cards and have them signed for him and return them to him.

Q (By Mr. Goldman) How long after you talked with Foley was it that you talked with Gillman?

A Oh, two days later.

Q And where was Gillman?

A He was in Detroit at the time I talked to him.

[Tr. p. 22.] TRIAL EXAMINER: He's already been through that conversation; now it's the next conversation that he had again with Foley, I believe it was, when that took place.

Q (By Mr. Goldman) Now, after your phone call with Gillman, approximately when did you call Foley?

A I don't recall. He came to me. About two days later.

Q About two days later?

A Yes.

Q Now subsequent to the time you spoke to Foley about the pledge cards, but prior to receiving them, did you have occasion to call Burns' office at the terminal?

A No, I didn't call Burns' office.

Q Did they call you?

A Major Goddard called me at the gate where I was working.

Q This is approximately how long after you spoke with Foley?

A A day or so after.

Q What did Goddard say to you?

A Goddard said they were contemplating on promoting me to a sergeant, and I told him if he felt I was qualified for it, I would appreciate it.

TRIAL EXAMINER: Did he say anything about cards at that time?

THE WITNESS: No, Major Goddard never spoke to me about the union at all.

TRIAL EXAMINER: Have you been promoted?

[Tr. p. 23.] THE WITNESS: I have, sir.

Q (By Mr. Goldman) Later that day, after your conversation with—

TRIAL EXAMINER: Major Goddard.

Q —Major Goddard, did you receive a phone call from Foley?

A Yes, I did.

Q What did he say?

A He told me that he had talked to Mr. Ingles into promoting me to a first sergeant.

Q (By Mr. Goldman) Did Mr. Foley mention anything to you about pledge cards at that time?

A He asked me if I had them signed. I told him I was working on them at that particular time to get them signed.

[Tr. p. 25.] Q (By Mr. Goldman) During the latter part of June, did you receive a phone call from Major Goddard?

A I did.

Q Could you approximate the date.

A No, I couldn't say.

Q What did Major Goddard say to you?

A He wanted me to bring the pledge cards I had signed to the Airport Office.

Q And what was your reply?

A I told him I was going to my grandson's birthday party and I would bring them down later.

Q Did he say anything else to you?

A He said he would be there at seven o'clock, and that's the latest.

Q (By Mr. Goldman) Did you receive a visitor at your home later that evening?

A I did.

Q What was the purpose of the visitor?

A Well, it was at ten o'clock in the evening approximately that he came to pick up these pledge cards.

[Tr. p. 26.] Q (By Mr. Goldman) Who was this visitor?

A He was an officer from Burns. At that particular time, I didn't know what his name was.

Q Well, have you found out since then who he is?

A His name is Kretzlow.

Q Did you have a conversation with Mr. Kretzlow?

A I did. He said he wanted to pick up the pledge cards, but I told him that I didn't have them with me, I had left them down at my daughter's, I had forgot and left them there.

Q Did you say something else to Mr. Kretzlow?

A I told him I would have them in the morning if they could pick them up in the morning.

Q The next morning, were you visited by someone?

A I was visited by Major Goddard. He came over and picked up the pledge cards.

Q Did you have a conversation with Major Goddard at that time?

[Tr. p. 27.] A No, I told him at that particular time that I was sorry, that I didn't have them down there with me, I told him what the circumstances were, and that was all the conversation.

Q While you were working for Wackenhut, what was your duty post?

A I was a guard at the area at the main gate.

Q Now you are a sergeant with Burns, what is your duty post?

A I am still a guard on the post, but not on the main gate. I'm over in Area 1.

Q Area 1. Since you've been—

TRIAL EXAMINER: Does a sergeant make more money?

THE WITNESS: He does, sir.

Q (By Mr. Goldman) What is the difference in the rate of pay between an officer and a sergeant?

A The different in the rate of pay, regular guard is $1.75, I receive $1.95.

Q Compared to your obligations as a guard under the Wackenhut agreement, have you taken on any more obligations as a sergeant under the Burns' contract.

A None whatsoever.

[Tr. p. 30.] DIRECT EXAMINATION

Q (By Mr. Gregory) Mr. Reitzel, you testified with respect to a conversation with Mr. New at the Airport

Office several days after your earlier conversation with Major Goddard; is that your best recollection of your testimony?

A Yes.

Q How were you advised to go to the Airport office on that particular day?

A We were advised to go there by Captain Bagby after we filed our applications, to go there and talk to Mr. New.

Q Did you proceed to the office alone or were you accompanied by another?

[Tr. p. 31.] A No, I went to the office myself.

Q Upon arriving at the office, what was the first thing that you observed?

A I went into this conference room and Mr. New was addressing one of the other boys that had been there —his name was Andrews. They were talking about wages and differentials, and so on and so forth.

Q Was there anyone else present in the room but that employee, Mr. New and yourself?

A Mr. Foley.

Q Did you know that it was Mr. Foley at that time?

A No.

Q What happened next?

A When he was finished with Mr. Andrews, I went up to Mr. New and he asked me if I had filed my application, and I told him I did, and he said, "Well, you go over to the next table and talk to the gentleman at the other table."

Q Did Mr. New introduce you to Mr. Foley at that time?

A No, no, he didn't.

Q Now, when you say at the next table, can you describe to the Trial Examiner, were they seated in the fashion that counsel for the respondent—

A Well, the table was more or less like you have there, only it was 10 or 15 feet away.

Q Was this Mr. New's office or—

[Tr. p. 32.] A No, this was in sort of a conference room where they were interviewing people.

Q Now, when you went over to Mr. Foley, did Mr. New remain in the room?

A Yes, he did.

Q Now, as near as you can recall, what did Mr. Foley say to you and what did you say to him on that occasion?

A Mr. Foley introduced himself to me, told me he was with the Federated Guards' Union. I introduced myself, and he in turn said he had been looking forward to me coming over, and so one of the other guards had told him I was Chairman of the Committee and he had expected me to get there, and he put one of those affidavits in front of me there to sign, and I read it over, and he showed me the contract, and I said, "Could I take the contract home with me, I would like to read over it?" He said, "That's the only one I have, I can't give it to you."

TRIAL EXAMINER: Excuse me, counsel, but I think the witness is a little bit confused. He said he put one of those affidavits in front of him to sign. Was it an affidavit or an application,

THE WITNESS: I mean a pledge card.

TRIAL EXAMINER: A pledge card for what?

THE WITNESS: For their union, the Federated Guards' Union.

Q (By Mr. Gregory) For membership in their union?

A For membership in their union.

[Tr. p. 33.] Q The earlier application you spoke of was an employment application?

A That's right.

Q You may proceed now, as near as you can recall, what did Mr. Foley say and what did you say back?

A Mr. Foley, when I asked him about taking his contract home, he said that was the only one he had said to me that you had to belong to the union to work over there. I said "I understand that you do have a union." But he says to me, "Burns couldn't live with that contract." So, in our conversation, I told him, I said, "Well, I will have to go back and I'll talk to the men and see if they will want to sign the pledge cards,

and if they do, I will do everything possible to get them signed because he couldn't get into the compound anyhow to do those things. So I took the pledge cards—I didn't take the pledge cards with me, he mailed them to me a few days later.

Q Was Mr. New present throughout the conversation with Mr. Foley?

A Yes, he was.

Q While you were having it with Mr. Foley, did Mr. New say anything?

A No.

Q Did Mr. Foley say to you on more than one occasion that you would have to sign the pledge card in order to work for [Tr. p. 34.] Burns?

A No, that was the only time he told me, at that particular time.

TRIAL EXAMINER: How far was Mr. New from Mr. Foley at the time you were speaking to Mr. Foley?

THE WITNESS: About 10 or 15 feet away.

[Tr. p. 35.] CROSS EXAMINATION

Q (By Mr. Swerdlow) Mr. Reitzel, you were the committeeman for the United Plant Guard Workers?

A That's right.

Q By Mr. Swerdlow) Now, this conference that you met Mr. New in, the size of that room is roughly about 20 by 40, is it not?

A Approximately, I think, yes.

Q Mr. New was at one end of the room and Mr. Foley was at the other end of the room?

A No, Mr. New wasn't at the other end of the room; he was about in the middle of the room.

Q Mr. New was in the middle of the room, on the long side?

A That's right.

Q He was in the middle of the room, but Mr. Foley, where was he?

A He was close to the wall.

Q I see. Now, that is about the same distance that I am to that wall?

A About that, yes, I would say that.

Q What is your estimate of this distance?

A 20 or 30 feet probably.

Q Mr. Foley was 20 or 30 feet from Mr. New.

A Yes.

[Tr. p. 40.] Q Now, when you were speaking to Mr. Foley, what was Mr. New doing?

A I think he was interviewing some more men at the table.

Q He was sitting 20 or 30 feet from you talking to somebody else and you were at the other end talking to Mr. Foley; were you talking in the same tone of voice that you are talking in now?

A Yes.

[Tr. p. 43.] Q Now, at the time of the take-over—well. I'll say just before the take-over, when you were still working for Wackenhut, where was your post?

A Area 4, the Main Gate there.

Q You were at the Main Gate in Area 4?

A That's right.

Q And were you the only person in Area 4?

A At that particular time, yes.

Q And that post was manned 24 hours a day?

A That's right.

Q And you were there, what was your hours?

A Six to two, six in the morning until two in the afternoon.

Q You relieved the night man at six—

A That's right.

Q And you would see the fellow who relieved you at two?

[Tr. p. 44.] A That's right.

Q You worked on that post on June 30, just before the—the last day of the Wackenhut sub-contract?

A That's right.

Q Where were you working on July 1?

A July 1?

Q Yes.

A I was working in the same place.

Q And you worked on the same post for how long?
A Oh, I would say seven months, six or seven months.
Q Since July 1?
A Do you mean as of now or last year?
Q Since July 1.
A I worked there ever since Burns had taken over in July.
Q I see. You kept the same job?
A Same job.

[Tr. p. 58.] THOMAS C. WARE

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Goldman) Mr. Ware, were you employed by Wackenhut Corporation?
A Yes.
Q During what period of time?
A I think I began with them June the 6th.
Q Of what year?
[Tr. p. 59.] A '66.
Q And what type of work were you hired to do?
A Assistant to the sergeant.
Q And that is a sergeant of what?
A He was the sergeant on duty at the time.
Q Plant guard?
A Plant guard.
Q Directing your attention to the early part of June, 1967, did you have the occasion of being contacted by someone, or did you contact someone with regard to a possible position with Burns at Lockheed Aircraft Service?
A Yes, I was notified by, at this time, Captain Bagby, at that time he was a sergeant, that Burns had got the contract and I was to go over if I wanted to get a job with them.

[Tr. p. 60.] Q (By Mr. Goldman) Now, I take it when you say you went over to get a job with them, you went over to the Burns' office?

A I went to the Burns' office to get an application.

Q (By Mr. Goldman) When you went over to the Burns' office, [Tr. p. 61.] who did you meet there?

A I don't know his name; there was a Captain over there and I asked for an application, and he gave it to me, and I left.

Q Was there anybody else there?

A There was a young lady in the office and some other help.

Q Did you have occasion to go back to the office with the application?

THE WITNESS: Yes, I took the application home, and after a few days, I took the application back down to Burns.

Q To Burns, you went into the Burns' office?

A Right.

Q Who was present in the Burns' office?

A The same Captain who told me to go into the next room.

Q Told you to go in the next room; did you go in the next room?

A Yes, I did.

Q What happened when you went into the next room?

A Mr. New was there at the table. I handed him my application.

Q Did you have a conversation with Mr. New?

A Yes, I did.

[Tr. p. 62.] Q What did Mr. New say to you?

A After looking over the application, he asked me if there was any questions, and I said, "Yes, I would like to know if there would be any cut in pay, I wanted to know about the hospitalization and medical and other pertinent details," and he said, "The gentlemen in the rear of the room will answer all those questions for you."

Q He said, "The gentleman in the rear of the room will answer the questions for you"?

A Right.

Q You heard the testimony of Mr. Reitzel; is this the same room as described by—

A Exactly.

Q —Mr. Swerdlow, 20 by 40?

A Right.

Q And whereabouts was this other man in the room?

A He was sitting at another long table and had his back against the wall.

Q Approximately how far from Mr. New and yourself?

A 30, 35 feet.

Q Did you go over to that gentleman who was sitting at the other end of the room?

A I had to wait till he finished with a gentleman, and when he got finished, I went over and sat down.

Q Did he introduce himself to you?

[Tr. p. 63.] A He did.

Q Well—

TRIAL EXAMINER: What happened when you went over and talked to this fellow?

THE WITNESS: Well, my first question was—I introduced myself and I said, "Mr. New told me to come over to see you, and I have some questions I would like to ask, and he said that you had the answers." He introduced himself, he didn't say he was union or anything.

TRIAL EXAMINER: Did he say who he was?

THE WITNESS: He said his name was Foley, that was all. After I asked the question, he didn't answer them, and he kept pushing this piece of application in front of me, and I pushed it back, and he pushed it, and I pushed it back, and finally I said, "What in the world is this, a game?" He said, "That is the pledge card for the union." I said, "I already belong to a union." "Well," he said, "that thing is out." I said, "In the State of California, I have 30 days to make up my mind whether I want to join your union or not." He said, "Not in this case," he says, "You join this, or you won't go to work for Burns." So, I told him that Mr. Reitzel was coming over to see him, and he was our chairman and he would get the complete dope for us,"

and I didn't hear from him after that. Then he gave me this card which showed he was connected with the union.

[Tr. p. 64.] TRIAL EXAMINER: When did you have that conversation with Mr. Foley? Before or after July 1st?

THE WITNESS: It was after July 1st.

TRIAL EXAMINER: How long after July 1st, after Burns took over?

THE WITNESS: I beg your pardon, before July 1st.

TRIAL EXAMINER: About how long before July 1st?

THE WITNESS: The latter part of June.

TRIAL EXAMINER: During the last week or so?

THE WITNESS: Yes, I would say so.

TRIAL EXAMINER: Proceed, counsel.

Q (By Mr. Goldman) While you were having that conversation with Mr. Foley, was Mr. New present in the room?

A No.

Q He wasn't. Did you notice when Mr. New left the room?

A He left as soon as I left them.

Q At that point, did you sign a card?

A No.

Q You didn't. Under Wackenhut, what was your duty station?

A Assistant to the Sergeant, stationed at Gate 201.

Q Gate 201. Now, when you started to work for Burns, were you assigned to the same duty station you just described?

A Yes.

[Tr. p. 70.] TRIAL EXAMINER: If you want to amend the complaint, certainly the idea of a complaint is not to confuse with a lot of questions about a Hackelhurst when there is no Hackelhurst.

MR. GOLDMAN: I move to amend the complaint.

TRIAL EXAMINER: Substitute Kretzlow in place of Hackelhurst in Paragraph 6 were it appears and also

in all other places in the complaint where the name Hackelhurst appears.

Any objection?

MR. SWERDLOW: No objection.

TRIAL EXAMINER: Without objection, the motion is granted.

[Tr. p. 71.] CHARLES A. BLANKEMEIER

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

[Tr. p. 72.] DIRECT EXAMINATION

Q (By Mr. Goldman) Were you employed by Wackenhut Corporation?

A Yes, sir.

Q Would you give us the dates?

A Well, originally I was hired as GPP, General Plant Protection. They bought out GPP, and I continued from May 18, 1959, up to the present time.

Q You are not with Wackenhut right now, you are working for Burns?

THE WITNESS: To July 1.

Q (By Mr. Goldman). What type of work were you hired for?

A Plant Guard.

Q Did there come a time you had a conversation with someone regarding possible further employment with Burns Detective Agency at Lockheed Aircraft Service?

A They had told me they were taking over. It was just rumored.

Q Did there or did there not come a time when you had a [Tr. p. 73.] conversation with somebody about filing an application?

A A Lieutenant Holman came to the main gate at Lockheed with an application for me.

TRIAL EXAMINER: When was this?

THE WITNESS: 28th day of June.

Q (By Mr. Goldman) Did you have a conversation with Lieutenant Holman on that date?

A Yes, I did.

Q What did he say to you?

A He wanted to have me sign an application. I asked him if you had to join a union. He said I could save my three bucks, I didn't have to join.

Q Did he give you the application?

A Yes, he did.

Q Did you have occasion to return the application?

A He wanted it immediately. I said I couldn't do it at the time, I was busy. So I returned it the next day.

Q (By Mr. Goldman) Did you have occasion to go to the Burns' office at the airport the latter part of June, 1967?

A Last day of June, to pick up a uniform.

Q To pick up a uniform; who was present when you arrived [Tr. p. 74.] at Burns' office at the terminal?

A Major Goddard and Captain Kretzlow.

Q What did you do when you entered the office?

A I asked for my uniform, and Major Goddard handed it to me, and as I was preparing to leave they had me sign a statement of receiving that uniform, and as I reached for the box to go out, he said, "There is another slip to sign." That was union.

Q I show you General Counsel's Exhibit No. 4 which has been marked for identification as Exhibit No. 4; can you identify this?

TRIAL EXAMINER: That was presented to you by who?

THE WITNESS: Captain Kretzlow.

TRIAL EXAMINER: In the presence of Major Goddard?

THE WITNESS: Yes.

MR. GOLDMAN: I would like to offer this into evidence at this time without the writing.

MR. SWERDLOW: What writing are you referring to?

(Mr. Swerdlow is shown by Mr. Goldman.)

MR. SWERDLOW: I would like to ask some questions about those arrows.

TRIAL EXAMINER: All right, I will permit that.

MR. SWERDLOW: Were these arrows on here when you got it?

THE WITNESS: Yes.

MR. SWERDLOW: Whose initials were these?

[Tr. p. 75.] THE WITNESS: I don't know.

MR. SWERDLOW: Were they on it when you got it?

THE WITNESS: This was on, this was on (indicating).

TRIAL EXAMINER: This doesn't mean anything in the record.

The signature of Jack Foley was on there at the time you got it?

THE WITNESS: Right.

TRIAL EXAMINER: The writing, "$5.00", after "Initiation Fee", was that on?

THE WITNESS: Yes.

TRIAL EXAMINER: Those arrows were on it?

THE WITNESS: Yes.

TRIAL EXAMINER: You don't know whether the initials were on it or not?

THE WITNESS: No.

TRIAL EXAMINER: This "Amount Paid", was that crossed out at the time you got it?

THE WITNESS: No.

MR. SWERDLOW: What about that one?

THE WITNESS: That was not on there.

TRIAL EXAMINER: Any objection to receipt in evidence?

Without objection, General Counsel's Exhibit 4 for identification is received in evidence.

(Above-referred to document was marked General Counsel's Exhibit No. 4 for idenitfication and received in evidence.)

[Tr. p. 76.] Q (By Mr. Goldman) Directing your attention to General Counsel's Exhibit 4, Mr. Blankemeier, did you sign the form where the two arrows point?

A You mean that piece of paper?

Q A form similar to this where two arrows are pointed?

A Yes, I did.

MR. SWERDLOW: I don't understand the question.

TRIAL EXAMINER: He signed the form similar to General Counsel's Exhibit 4 and at the places where the two arrows are pointed.

Q (By Mr. Goldman) When you signed the form, were there any other parts of the form that were filled out?

A No, except as mentioned before.

TRIAL EXAMINER: Jack Foley was written on it?

THE WITNESS: At the bottom.

Q (By Mr. Goldman) Where Jack Foley was written on it, were any of these?

A No.

TRIAL EXAMINER: After you signed it, what did they do, throw it away?

THE WITNESS: Keep it.

TRIAL EXAMINER: How do I know?

Q (By Mr. Goldman) After you signed this form, what happened?

A Went along with the uniform size.

[Tr. p. 77.] Q Went to Captain Kretzlow?

A Captain Kretzlow kept it.

Q What else happened?

A That's it.

TRIAL EXAMINER: Did you give him five dollars?

THE WITNESS: No, I didn't.

DIRECT EXAMINATION

Q (By Mr. Gregory) Lieutenant Holman who gave you the application for employment at the gate was a Burns' Lieutenant or a Wackenhut Lieutenant?

A Burns.

Q Was Major Goddard present when you handed back the signed union application card?

A Yes, he was.

[Tr. p. 82.] HARRIS K. CAMP

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Goldman) Mr. Camp, were you employed by Wackenhut Corporation?

A Yes, I was.

Q During what period did you work for Wackenhut?

A At the Lockheed plant, I worked from April, '56, till the last of June, '67.

Q What type of work were you hired for?

A Plant Guard.

[Tr. p. 83.] Q (By Mr. Goldman) Did you have occasion to contact anyone with respect to possible future employment with Burns?

A First, Mr. New and Sergeant Bagby notified me Burns had the contract and if I wanted to work, to go over and get an application and fill it out.

Q Did you go over and get an appliaction?

A Went over on or about the 10th of June, I reported to the Burns' office.

Q Where is this office?

A Main Terminal building, Ontario Airport, at that time, Room 2. I went, started into the office. Major Goddard and the secretary were in the office. They told me to go to the next room and wait. I went in, and the only man in there was Mr. Foley, and he introduced himself.

Q Did you have a conversation with Mr. Foley?

A Yes, I did.

Q What was said?

A He told me Burns had the contract now, if I wanted to work for them, I would sign the union card. He handed the union card out, and at that time I was on my way to work, so [Tr. p. 84.] I told him I would think about it. I went back into the office when he finished, received an application from Major Goddard. He interviewed me, gave me the application. I didn't fill it out at that time. I filled it out and brought it back the next day.

Q Did you have a conversation with Major Goddard at that time?

A Yes, sir.

Q What did he tell you?

A To fill out the application and bring it back, which I did; the next day I brought it back to him, gave it to him, and they got my clothing sizes, and at the time I told him I was going on a 15 day vacation, I would be back the 1st of July.

Q Did you have occasion to visit the Burns' office sometime later in the month or pick up your uniform?

A Yes, I did, when I returned from vacation. On the 30th of June, I went in, picked up my clothes, filled out the clothing slip, and on the stack was a slip that was supposed to be signed for the union.

Q Directing your attention to this dealing you had for your uniform, who was present there?

A Major Goddard and secretary—I don't know her name.

Q That was when you had to go pick up your uniform?

A It was, I picked up my uniform, Captain Kretzlow gave [Tr. p. 85.] me the paper work to sign for the clothing and the slip for the union.

Q Union pledge slip?

A That's right.

TRIAL EXAMINER: If it's the same as General Counsel's 4, why don't you show that to him and ask him if the pledge card you refer to is like this?

Q (By Mr. Goldman) Was the slip that Captain Kretzlow gave you similar to General Counsel's Exhibit No. 4?

A Yes, it was similar to that.

Q Did you have a conversation with Kretzlow?

A Yes. He just told me to fill out the clothing slip.

TRIAL EXAMINER: What did he say about the union slip, if anything?

THE WITNESS: He said that had to be signed. That was in the paper work for the clothing, though. I went ahead and signed it.

Q (By Mr. Goldman) Under Wackenhut Corporation, what was your duty station?

A I was the swing shift sergeant.

Q Beg your pardon?

A Swing shift sergeant.

Q Now that you are working for Burns, what is your duty station?

A The same only day time.

[Tr. p. 86.] TRIAL EXAMINER: Is it stipulated that sergeants, Wackenhut and Burns, were employees and not supervisors within the meaning of the Act?

MR. GOLDMAN: No, it's not stipulated as such. I would like to offer that.

TRIAL EXAMINER: I am asking, will you stipulate?

MR. GOLDMAN: Yes, that they are employees, not supervisors.

TRIAL EXAMINER: Will you so stipulate?

MR. SWERDLOW: Yes.

TRIAL EXAMINER: Stipulation is accepted.

MR. GREGORY: Both as to Wackenhut and Burns.

TRIAL EXAMINER: As to Wackenhut and Burns.

DIRECT EXAMINATION

Q (By Mr. Gregory) Mr. Camp, on the occasion of your visit on June 10 to the Burns' office, when you said Mr. Foley introduced himself to you; this room, was that part of the Burns' office?

A It was in the building. It was 210, I believe, the room they were in at that time was 212.

Q The room next to the room that Major Goddard and the secretary were in?

A Yes.

Q After you signed the union application card, General [Tr. p. 87.] Counsel's Exhibit 4 on or about June 30, what did you do with it?

A I gave it to Captain Kretzlow.

Q Did he say anything to you at that time?

A No.

[Tr. p. 90.] STANLEY L. GANIEWSKI

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Goldman) Were you employed by Wackenhut Corporation?

[Tr. p. 91.] A Yes, sir.

Q During what period of time?

A Say from 1964, continuous until June the 30th.

Q For what type of work were you hired to do?

A Security Guard.

Q Did there come a time when you had a conversation in regard to employment with Burns at Lockheed?

A Scuttlebutt was going on the early part of June, Wackenhut was losing the contract and Burns taking it over, and I was supposed to go over to Ontario Terminal Building at the Airport, that was to go there, I believe it was about the 10th of June. Major Goddard was sitting there with the secretary and some other Burns' officers were there. I asked Major Goddard where were the applications at. He pointed to the hall to the left. I believe it was Room 212. I walked in there. There was only one man present at the time. That was Mr. Foley. He introduced himself, stated his business, that he was a union representative for the Burns' organization, the American Federation, whatever it is. He told us now that Wackenhut is out, we would have to join their union in order to continue working. So he had a little contract book with him, and he started reading over various paragraphs. I interrupted him and asked him, "Who does the union represent, management or labor?" He didn't answer. He continued on with something else. So I asked him for a [Tr. p. 92.] copy of that contract. He stated that was the only one he had, he couldn't give it out. He kept on talking about what a good organization they had, the union, seventy-five thousand in the bank, modern furniture, new equipment. I am not interested in the equipment they have. So he had a little card and asked me to sign it. At that time, I said, "If you can't answer the questions," I said, "I have to go to work. I'll think about it." So, I departed the building and reported to my post.

Q When Mr. Foley referred to a card, I show you a copy of General Counsel's Exhibit 4; is this similar to the card he showed you?

A He had so much paper in front of him, you couldn't tell. Yes, sir, this is something similar.

Q Did you sign such card?

A Not that particular day.

Q Under Wackenhut Corporation, what was your duty station.

A At the beginning, it was more or less fill-in various posts, but for the past, I would say, year and three months, I have had interior security, Hanger 2.

Q That's with Wackenhut Corporation?

A Yes, sir.

Q When you started working for Burns, were you assigned to the same post?

A The same position, yes, sir.

[Tr. p. 93.] Q Are you still in that position?

A Yes, sir.

CROSS EXAMINATION

[Tr. p. 95.] Q (By Mr. Swerdlow) Did you see Mr. New?

A Let's see. It was much later when he accepted an application to get my clearance, transfer from Wackenhut organization to the Burns' organization.

Q This was after you signed the union card?

A Much later.

[Tr. p. 96.] Q Was there any discussion of the union with Mr. New?

A The only thing he said, my salary would be the same as it was with Wackenhut, and the first pay check, it was a dollar short—a dollar sixty-five, 15¢ an hour short.

REDIRECT EXAMINATION

Q (By Mr. Gregory) Did you say the pay check came up 15¢ short? What rate had you been receiving prior to being employed by Burns?

A Not directly to me, but to the group.

[By Trial Examiner] Who told this to the Group.

THE WITNESS: Mr. New.

[Tr. p. 97.] TRIAL EXAMINER: This was after Burns had taken over.

THE WITNESS: That was in the month of June.

TRIAL EXAMINER: They told you your pay would remain the same?

THE WITNESS: Yes, sir.

TRIAL EXAMINER: It turned out it didn't remain the same?

THE WITNESS: No, sir.

Q (By Mr. Gregory) What is your present rate of pay?

A It was adjusted six pay days later. This would be sometime in August, in that period somewhere.

Q From July 1 to the latter part of August, your pay was $1.60?

A Right.

Q Subsequently raised to $1.75?

A Before that, if I may state this: I talked to Captain Bagby, asked him about my pay situation, which Captain Bagby couldn't do anything, referring me to Major Goddard. I went to see Goddard. He told me if I am dissatisfied, to quit, and they would adjust my differance in pay to terminate me. I just smirked under my breath and walked out.

Q When was your pay adjusted to $1.75 an hour?

A I couldn't exactly state, the last pay day of August or the first pay day of September, when everybody had his pay adjusted.

Q Was there any retroactive pay?

[Tr. p. 98.] A Yes, sir.

Q That pay check, did you receive the difference from July 1 until that pay check?

A Yes, sir.

WALTER DRAKE

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q Mr. Drake, were you employed by Wackenhut Corporation?

A I was.

Q During what period of time did you work for Wackenhut?

A Well, from the time they bought the General Plant out. I would judge around 1960, I am not sure, I think it was '60, '61.

[Tr. p. 99.] Q Up until when?

A Up until July 1.

Q What type of work were you hired for?

A Plant Guard.

Q Did there come a time when you had occasion to fill out an application card or contact anybody regarding the applying for a job with Burns Detective Agency at Lockheed Aircraft Service?

A Yes, sir.

Q Approximately when did this occur, and who did you see?

A First one I talked to was Major Goddard.

Q What did he tell—

TRIAL EXAMINER: When?

THE WITNESS: I would judge somewhere around the 10th to 15th of June.

Q (By Mr. Goldman) What did Major Goddard tell you?

A I asked him about the wages and one thing or another, and he said, "you won't lose anything." He said the wages would be the same.

Q On or about the latter part of June, did you have occasion to go to the Burns' office at the Terminal Building at the Ontario International Airport, did you have occasion to go to the Burns' office?

A I did.

[Tr. p. 100.] Q (By Mr. Goldman) Why did you go there?

A To pick up my uniform.

Q When you went to the Burns' office, who was present?

A Major Goddard, some Captain, don't ask me who he was, I don't know.

Q Did you have a conversation with this Captain?

A The Captain brought the uniform over and handed me a slip of paper and said, "You will have to sign this." I took a look at it and say, "Why?". He said, "You have to sign it before you can go to work."

Q When he said, "You have to sign this," was he referring to something similar to General Counsel's Exhibit No. 4?

A Looked very much like it to me.

TRIAL EXAMINER: Did he tell you what it was for?

THE WITNESS: Yes.

TRIAL EXAMINER: What did he tell you it was for?

THE WITNESS: Their union.

[Tr. p. 101.] TRIAL EXAMINER: And was Major Goddard within hearing distance when this Captain made this statement to you?

THE WITNESS: As close as that gentleman here.

TRIAL EXAMINER: Would you say he was two or three feet?

THE WITNESS: Not over five.

TRIAL EXAMINER: Not over five feet from you. Did you sign the paper?

THE WITNESS: Not then. I didn't know.

TRIAL EXAMINER: What did you say, if anything, when they asked you to sign this?

THE WITNESS: I said, "I understand I have 30 days." They said you would sign it before you went to work or just wouldn't go to work.

TRIAL EXAMINER: You may examine.

Q (By Mr. Goldman) After you had told Captain Kretzlow you didn't want to sign it, what occurred?

A I went down to wait for Captain Bagby to tell him I wouldn't be in in case he had me scheduled. I waited about an hour. He didn't come over. So I went back up to tell them to tell him when he came in I wouldn't be there. There was nobody in the office but Major Goddard. He apologized and said I was right as far as the 30 days was concerned, but they would still like to have them signed before we went to work.

Q What was he referring to when he said, "They would like to have them signed"?

[Tr. p. 102.] A This paper or similar.

Q Union pledge card?

A Yes.

Q Did you sign that card?

A Yes.

TRIAL EXAMINER: That night?

THE WITNESS: That night. I left it laying right there. I had my uniform papers I signed for, and this paper was laying on top of it.

Q (By Mr. Goldman) Did you have a uniform box?

A Yes.

Q Were there any notations?

A Yes, "won't sign".

Q Were you present when that was put on the box?

A I was not present when it was put on the box.

Q (By Mr. Goldman) Why did you sign the card?

A Well, I got to work.

Q Under Wackenhut, what was your duty station?

A Well, I had several, I worked the post Mr. Reitzel worked and about everything in the plant.

Q Now, you are working for Burns, what is your duty station?

[Tr. p. 103.] A Swing shift sergeant.

MR. GOLDMAN: No further questions.

DIRECT EXAMINATION

Q (By Mr. Gregory) Mr. Drake, now that you are employed by Burns, are you working the same post you were working with Wackenhut?

A I have to get around to the same post, let's put it that way, nothing further.

[Tr. p. 108.] ARTHUR C. POTTER

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

Q (By Mr. Swerdlow) Would you please state your name and address.

A Arthur C. Potter, 1880 Los Robles, San Marino.

Q Mr. Potter, could you state who your employer is?

A I am director of West Coast Operations and Area Manager for Los Angeles for the Wackenhut Corporation.

Q Now, how long have you been in this particular position?

A Since approximately June of 1966 in this particular position. I say approximately because I came out here from Florida about that time.

Q Are you familiar with the operations of the Wackenhut Company in the Los Angeles and let's say Southern California area?

A I am.

Q Are you familiar with those operations as they were in 1967 prior to June 1?

A Yes, sir, I am.

[Tr. p. 109.] Q Now, approximately how many employees did Wackenhut Company—well, before we get into that, you were in your present job when the United Plant Guard Workers Union got the union organized and campaigned at Lockheed?

A Yes, sir.

Q And you are familiar with the operations of Wackenhut Company as they were in Southern California at that time?

A I am.

Q Now, the questions that I am going to ask you relate to the time that the union petitioned for election, the early part of 1967—

MR. GOLDMAN: At this time I would like to make the objection voiced in my opening statement that General Counsel considers this evidence irrelevant since even in plant protection service cases, a single plant unit is appropriate and whether the union is going to attempt to organize a larger grouping or whether the employer could have asked for a larger grouping, is immaterial.

TRIAL EXAMINER: Well, I note your objection. You think merely because you have a guard unit, that only a single plant unit can be appropriate; you could have wider.

MR. GOLDMAN: Yes, but only asking for an appropriate unit, and General Counsel contends a single plant unit is an appropriate unit.

TRIAL EXAMINER: Yes, well, I can conceive the situation [Tr. p. 110.] where Burns might come along, perhaps be organized all over the country. Maybe it's only one unit, or all Burns' employees throughout the country, and anybody, that that's the appropriate unit for accretion or something. I don't know. At the moment, I am overruling the objection.

MR. GREGORY: May I make the further objection, the evidence appears to be irrelevant and immaterial, that is as to the Wackenhut operation in the West Coast and, specifically, Lockheed, we have already stipulated that.

TRIAL EXAMINER: That seems to me to be pretty much correct. But we have a situation here where we have got a certified unit as recognized for Lockheed employees as plant guards. You don't dispute that was the appropriate unit so far as Wackenhut was concerned?

MR. SWERDLOW: Well, that's just what I am going to dispute, and the reason I think I have the right to dispute it is because, that was the appropriateness of that unit is very relevant to this proceeding, if that was not an appropriate unit, certification was improper and UPGW would have no bargaining right. Now, Burns was not a party to certification, and it is entirely erroneous to find we are bound by proceedings we were not a party to, and our rights depend on it, and this is especially so when there was never any hearing on this.

TRIAL EXAMINER: I am not concerned with whether or not [Tr. p. 111.] there was a hearing. The Regional Director approved of the consent election and stipulation, and the election having taken place, I would find that the Regional Director's action was properly conducted in due course, but I don't imagine you are going to be awfully long with this, are you?

MR. SWERDLOW: I don't know, I haven't met with Mr. Potter. I don't know what he is going to say.

TRIAL EXAMINER: I don't want you to be preparing your case while the witness is on the stand.

MR. SWERDLOW: The witness would not cooperate when we subpoenaed him.

TRIAL EXAMINER: All right, go ahead. Objections are overruled.

MR. GREGORY: I don't mean to belabor—

TRIAL EXAMINER: That's all right.

MR. GREGORY: It occurs to me when the demand for recognition was made by Charging Party on July 12 as reflected in stipulation, there shouldn't be any question. At that time, there was no question of the appropriateness of the demand insofar as it related to the unit, but simply insofar as apparent recognition had been granted to AFG. Now, because it is completed, I submit this is not the time in which to litigate a unit question.

MR. SWERDLOW: You are arguing on that, I understand, would be able to, may do it, that this we shouldn't be [Tr. p. 112.] allowed to argue.

MR. GREGORY: I would submit it's that, but it's more than that. That is not the essence. It is well established practice and procedure that representation matters are not litigated in "C" cases, and you had the opportunity, and you may yet have it if you want to file.

TRIAL EXAMINER: Address yourselves to me in this proceeding, not to each other.

MR. SWERDLOW: The representation matters not litigated in unfair labor practice cases has recently been ruled upon by two courts of appeal and which the result being that the Board and the cases were reversed for denying the hearing in 8(a)(5) case on matters which should have been raised and were raised during the "R" case. I can direct the Trial Examiner—

TRIAL EXAMINER: No, I am familiar with the case. When you say matters of unit and that sort of thing, you will note that General Counsel here alleges the appropriateness of the unit, and this is his responsibility to prove appropriateness of the unit. We take the position that he does that by introducing the certification. I am not certain in my own mind as to what my ultimate conclusions will be, but it occurs to me that per-

haps it's not improper for Respondent to be allowed to introduce evidence which is credited and might show that the unit is not appropriate, and I don't [Tr. p. 113.] think that merely because there has been a certification in the proceedings to which Respondent was not a party, that, therefore, for all time the unit question is resolved.

In any event, do you have any further objections?

MR. GREGORY: No, sir.

TRIAL EXAMINER: Nothing, Mr. Goldman?

MR. GOLDMAN: No.

TRIAL EXAMINER: The objections are overruled. Proceed, counsel.

Q (By Mr. Swerdlow) Well, I believe you testified that you were familiar with the operations of Wackenhut Company during the period when this election petition was filed for re-certification?

A Yes.

Q Can you tell me briefly what the organizational structure of the Wackenhut Company is, how you fit into it as the Director of West Coast Operations, who you report to, who they report to, how the division of the company is set up? Basically, I would like the kind of information that would appear in an organization chart.

A The Company is headed up by George Wackenhut as President, Corporate Headquarters at Coral Gables, Florida; Chief Vice-President John Ammerill; Vice-President in Charge of Operations; Vice-President in Charge of Development, and other corporate officers are all located at Coral Gables, [Tr. p. 114.] Florida. Would you like me to name the others?

Q No.

A We have offices in various principal cities in the United States and including South America. I was designated Director of West Coast Operations sometime in June, 1966, and requested by Mr. Wackenhut to take charge of the operations in Los Angeles, given the position of Area Manager for Los Angeles Office.

Q What territory was in your jurisdiction?

A It has not been defined geographically, but let me illustrate it in this way, in that we have operations, and

do at this time have operations in Martinez, California; we have our company corporation in Livermore, California, Santa Ana, and Orange County, and branch office in Santa Ana; and contract work up through Rio Grande Valley and San Gabriel Valley. We do not have offices as such in any of the West Coast States at this time.

Q In your office, who handles jobs, who would handle jobs for Wackenhut in the State of Washington?

A I would have to, more or less, it would depend on the job and its magnitude; I might, if the job warranted it.

[Tr. p. 115.] Q (By Mr. Swerdlow) What about the State of California, is your jurisdiction over all jobs?

A With the exception of Livermore, I am.

Q I am talking about the time of certification; you are talking about February and March, 1967, at that time; all my questions are going to be related to that period, not your present operation. At that time, your office had jurisdiction over all the jobs in California?

A All with the exception of one supervised out of our corporate headquarters.

Q That's at Coral Gables?

A That job was not in this area, but in the State of California.

Q Does your office handle any jobs, states bordering in California?

A Not if you are speaking of guard operations. I might supervise and occasionally investigate in some other state, not on guard jobs.

Q All the guard operations are in California. Now, how many different jobs does Wackenhut Company have in the State of California that were under your jurisdiction at that time?

A I couldn't say off hand; there are several hundred of them. I would have to look at the records.

[Tr. p. 117.] TRIAL EXAMINER: Do you have any contractual relation with any union covering all the guard operations?

THE WITNESS: No, we do not.

TRIAL EXAMINER: Do you have any covering more than one guard job operation?

THE WITNESS: Not to my knowledge, not in California.

TRIAL EXAMINER: All right, not in this area?

THE WITNESS: No.

TRIAL EXAMINER: Go ahead, counsel.

Q (By Mr. Swerdlow) I would like, to the best that you [Tr. p. 118.] can give us, an estimate of the number of guard jobs that Wackenhut had at the time we are concerned with here, regardless of the number of guards on the job, and excluding investigations, investigating kind of jobs?

MR. GOLDMAN: I object. I think that's ambiguous. He is not defining the territory.

TRIAL EXAMINER: He is talking about the area under this witness' jurisdiction.

THE WITNESS: It would be a very rough estimate.

TRIAL EXAMINER: Well, give us a rough estimate.

THE WITNESS: I could only say two or three hundred.

Q (By Mr. Swerdlow) All those jobs were supervised out of your office, the overall top level supervision?

A Yes.

Q Now, where is the Wackenhut office that you operate out of?

A This particular office where I have my administrative office, 618 South Serrano Avenue in Los Angeles.

Q And you supervise all of these jobs out of this office. Are there other organizations of Wackenhut Company in the California area, in the State of California?

A As of the date you mention, the only other office would be our branch office at Santa Ana, California, and the central station for alarm work at 6900 South Hoover Street in Los Angeles.

[Tr. p. 120.] Q (By Mr. Swerdlow) How are wages, fringe benefits, determined for employees in the California area?

A Those wages are set and approved by our corporate office in Coral Gables.

Q Is it the same for all employees in the California area?

A Yes, I might recommend subject to approval of the corporate office.

Q This would include all employees?

A Yes, sir.

Q What about fringe benefits?

A The same would apply, generally speaking.

Q What I mean by fringe benefits, holidays?

A Yes.

Q Vacations, things of that nature; is that the same as wages?

A Generally speaking, yes. I say generally speaking because, of course, we have our conferences and agreements and negotiations with our client and our final agreement and our final contract subject to approval by corporate headquarters at Coral Gables.

Q I see, and before it's approved, you have to approve it?

A Yes, sir.

[Tr. p. 132.] Q And the coordinator, is his job keeping track of where an area supervisor is on different days?

A Gives them assistance where needed, hiring men and training men, placing them on particular spots.

Q Meaning guards?

A Yes, sir.

Q What do the area supervisors do?

A Supervise the jobs and men in their particular area.

Q Now, let me get back to the coordinator for one minute; is he in a policy making role?

A No.

Q Area supervisors; you had eight of them at the time of the election; what are their functions?

A To supervise the guard jobs in the particular area.

Q About how many jobs does each area supervisor supervise?

A That varies a great deal depending upon the geographical covering of this area and the number of guard jobs in the area. He may have only four guard jobs in the area; he may have a dozen.

Q And if he has four guard jobs, how does he divide his [Tr. p. 133.] time?

A Divides his time up wherever is most appropriate. Some jobs require a lot of his attention; some require very little.

Q When you say he supervises the jobs, what does he actually do with regard to them?

A He has to see positions covered on all three shifts, and if a man fails to show up because of illness or for any other reason, he gets hold of another man, gets him in there to cover that spot, sees that we fulfill our contract in that particular area.

Q He checks to see if the company policy is being enforced?

A Yes, sir, that is part of his responsibility.

Q Now, these eight, they cover the California area?

A Yes.

Q About how many facility supervisors did you have at the time?

A I couldn't even approximate. It would generally fall into a definition category, as to what is a facility supervisor, generally only on larger jobs, might be on some other jobs, might be at the request of the client a lead guard or what-have-you. So, my guess, any guess I made would be a guess, not a statement, it would be very rough, I am afraid not more than one quarter of our jobs, if that high, is facility supervised. I may be way high.

[Tr. p. 134.] Q Facility supervisor is the lowest level supervisor that the company has, is that right?

A Depends on the definition of a supervisor; the lowest level that we would, company-wise, give him.

Q The title of supervisor?

A Yes. He may have the title of Sergeant, Captain, Lieutenant.

Q Are there people below him who have the power to hire, fire?

A No, a facility supervisor may not have the power to hire or fire, depending on the particular authority given him.

Q What about the authority to make effective recommendations with regard to hiring and firing or other disciplinary matters?

A I would say he would be most likely to have the authority to hire, most facility supervisors would have that responsibility, but he may not have the responsibility to fire. We want to hold that authority to the area supervisor.

Q The facility supervisor is the lowest supervisor, speaking of authority to hire and fire, the facility supervisor is the lowest supervision of the company?

A Yes.

Q Now, with the area supervisors, do they hire employees, interview them and process?

[Tr. p. 135.] A Generally speaking, yes.

Q That's what they do, do they discharge employees, fire them?

A Yes, area supervisor may very well discharge or fire an employee.

Q And with respect to all of the jobs under your jurisdiction, they do this, the area supervisors?

A Yes, there may be an occasional exception where the facility would.

Q He will delegate that?

A Yes.

Q Would that be frequent?

A Rare.

Q What percentage of your jobs do you think that happens, that area supervisors delegate the authority to the facility supervisor to hire or fire?

A He would not have delegated that—I recall—he would not delegate that authority. We or the manager of physical security might delegate that authority to the facility supervisors.

Q I am not trying to trip you. With regard to those facility supervisors, percentage-wise, what percent of facility supervisors would have that kind of delegation?

A A very small percentage because it would only be our policy, that policy would be carried out on large facilities.

[Tr. p. 137.] Q Now, in regard to guards, do you interchange guards? [Tr. p. 138.] I am talking about, again, everything I have been asking about relates to the time of this election?

A There are some areas where you interchange quite a bit, and other areas very, very seldom.

Q Let's take the Los Angeles County area?

A I am speaking of the Los Angeles County area, I am saying within the Los Angeles County area, there are various areas where we interchange quite a bit and others where we don't because of geographic and clearance problems and other problems, and because of the fact that problems of working conditions and pay rates are such that we can't interchange, or because it wouldn't be economically feasible. We may have a job setting so far from another job that it's not feasible to interchange.

[Tr. p. 147.] Q When did Wackenhut first get the Lockheed job?

A The Lockheed job was one of the jobs already in existence when the Wackenhut Corporation purchased the General Plant Protection Company in 1962.

[Tr. p. 153.] Q Now let's talk about the Lockheed job again. How many employees of Wackenhut have hired on at Lockheed again, talking about the period just at the time of the election?

A There was fluctuation on this job as in any other job because of our need to have men on standby and part-time basis to fulfill the requirements of Lockheed Aircraft Service.

Q What's the range that you fluctuate?

A I would say somewhere in the neighborhood of 42 men and the supervisor.

Q And supervisor?

A 43 including the supervisor.

Q One supervisor and 42 guards! I am not trying to confuse, I just didn't understand.

[Tr. p. 154.] (By Mr. Swerdlow) There was a supervisor on the Lockheed job?

Q I see, and who was that supervisor?

THE WITNESS: Russell Frazier.

Q (By Mr. Swerdlow) And when Wackenhut ceased to perform guard services at that facility, Lockheed facility, did Frazier remain as a Burns' employee?

A No, he did not.

Q Now, were there sergeants below Frazier on the job?

A Yes, sir.

Q And did they vote in the election that took place that the Board conducted in February?

A I don't know who voted in the election.

Q Now, the employees at Lockheed, now, were any of them transferred from other jobs Wackenhut had?

A Some of them may have been. I cite as an example, that in view of the security clearance requirement, a man could not always be put immediately on that job until his clearance came through. Generally, that man would be assigned to a facility no longer in operation by Wackenhut Corporation—moved to another area, that was immediately west of Lockheed—and would be placed in that particular position not requiring [Tr. p. 155.] clearance temporarily until his clearance came through, and then assigned to Lockheed facility.

Q How many people were assigned in that manner in the year that immediately preceded the election?

A I have no idea.

Q Who would have that information?

A That would be in our company's records.

Q Now, Captain Frazier was at the job for the entire year preceding the election?

A Yes, sir.

Q Did he work for General Plant Protection before Wackenhut?

A Yes, he did.

Q Were any people transferred from the Lockheed job the year immediately preceding the election to other Wackenhut jobs?

A Were any other people transferred from Lockheed jobs to other jobs?

Q Were any guards transferred from Lockheed job to another job that Wackenhut has?

A Not to my knowledge.

Q And would the company records, or would this be the kind of matter that you would have personal knowledge of?

A No, not necessarily because we have many jobs.

Q The company records would indicate the number transferred [Tr. p. 156.] in and out?

A Searching of payroll records, I imagine this information could be determined.

Q Now, Captain Frazier did have authority to hire employees?

A Yes, within the restrictions I have previously mentioned in testimony.

Q Now, did Captain Frazier have authority to discharge employees?

A Yes, he did.

Q And would his action be subject to approval of anybody in the company?

A Certainly, it would be subject to the approval of the manager of physical security and my approval.

Q Would he take the action before getting this approval or take the action and then get approval afterward; if that's not the way it works, how did it work?

A I couldn't answer that because I don't recall if anyone was discharged by Captain Frazier.

Q Was anybody disciplined?

A Yes, I can state to my own knowledge there were disciplinary measures taken of the guards during that period of time, yes, sir.

Q Did Captain Frazier get approval before taking those actions?

A Yes, sir, he filed a report.

[Tr. p. 157.] Q And then after the report was approved, he would take the action that he wanted to?

A He would take the action that he was instructed to take.

Q Now, where do the employees get their uniforms from?

A Well, speaking of all of our employees in the State of California, they get them from various locations, depending on the location where they are assigned.

Q Where would Lockheed get them?

A They would come into headquarters.

[Tr. p. 161.] Q (By Mr. Swerdlow) When the contract with Lockheed terminated, what happened to the Wackenhut employees; you already testified Captain Frazier remained as a Wackenhut employee?

A The other employees were terminated.

A All of them?

A Yes, sir.

Q Are there any of them now working for Wackenhut on other jobs?

A Not to my knowledge.

[Tr. p. 163.] CROSS EXAMINATION

[Tr. p. 169.] Q (By Mr. Goldman) When a new job was needed, new staffing requirements had to be met at Lockheed Aircraft Service, what did the facility supervisor, Mr. Frazier, do?

A Locate the man or men needed, interviewed them, he would have them submit applications.

Q Did he advertise in newspapers, to the best of your knowledge?

A To the best of my knowledge, it would be a rare occasion when he advertised in newspapers in this particular area.

Q Did he operate out of the Santa Ana office at all?

A No, sir.

Q I would like to get back to the Livermore operation; I understand you are in charge of all California except for Livermore?

A That's true.

Q Why, to the best of your knowledge, why is Livermore not included?

A I can only say that was company policy.

Q Where are the records of employees of Livermore kept?

A I do not know, sir.

Q Are they kept at your office?

A No, sir.

Q Kept somewhere other than your office?

A Yes, sir.

[Tr. p. 189.] J. FORREST INGLE

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Swerdlow) Mr. Ingle, would you state your present employer and your title?

A Branch Manager for the Los Angeles office of the William J. Burns International Detective Agency, Inc.

MR. SWERDLOW: I would like to have this marked for identification. This is Number 2.

(Document referred to above was marked Respondent's Exhibit No. 2 for identification.)

Q (By Mr. Swerdlow) Mr. Ingle, I am going to show you a copy of Respondent's Exhibit No. 2; could you tell me what that is?

A That is an organizational chart of the William J. Burns [Tr. p. 190.] International Detective Agency, Inc.

Q And how was this prepared?

A This was prepared in my office with particular reference to the station of the Los Angeles office and its responsibility to the general headquarters and in reference to the area of the Los Angeles office operations.

Q Who prepared it?

A It was prepared by my assistant from a rough draft which I furnished him.

Q Did he alter anything that was on the rough draft?

A No.

MR. SWERDLOW: I offer Respondent's Exhibit No. 2 into evidence.

TRIAL EXAMINER: Any objections?

MR. GOLDMAN: Yes, Your Honor. Shift supervisors, we did stipulate that the sergeants in our proceeding, namely Drake and Camp, were employees under the Act, just to make this clear that this is not shift supervisor, statutory supervisor.

MR. SWERDLOW: O.K.

TRIAL EXAMINER: You do not contend, Mr. Swerdlow, that where there is a listing for "shift supervisor", that they are supervisors within the meaning of the Act?

MR. SWERDLOW: No. No, we are abiding with the prior stipulation,

[Tr. p. 191.] TRIAL EXAMINER: Then there is no objection with that understanding?

MR. GOLDMAN: No objection.

TRIAL EXAMINER: Without objection, Respondent's Exhibit No. 2 is received in evidence.

(Document above referred to marked Respondent's Exhibit No. 2 for identification was received in evidence.)

Q (By Mr. Swerdlow) Now, with reference to the organizational chart on Respondent's Exhibit 2, could you tell me what Mr. King's duties are?

A Mr. King is a member of the board of directors, and he is the vice-president of the corporation. His duties encompass the entire operations of the company, although he is stationed in San Francisco and has particular reference to the duties as to the operations in the Pacific Coast Division. He was formerly the Division Manager of the Pacific Coast Division.

Q To the best of your ability, describe what his specific duties are and how they relate to the West Coast Division?

A Well, he has the overall supervision of the Division Manager's, the Division Manager's Office of the Pacific Coast Division. The Division Manager reports to the president of the corporation, but through the vice-president, Mr. King.

Q What sort of matters would Mr. King become involved in?

A He becomes involved in all operational matters of plant [Tr. p. 192.] security, investigations, and all of the other operations of the company. Now, he becomes involved in personnel, the managerial personnel, employment of staff members, managers and assistant managers, sales managers, that sort of thing.

Q What, if any, responsibility does he have with respect to employees' relations and labor relations.

A Well, he is the channel of the company policy from the board of directors to the division manager.

Q And Mr. Cronin, what does he do?

A Mr. James J. Cronin is the Division Manager and he has the overall supervision at the Seattle office, the Portland office, the Los Angeles Branch Office. We use the term "branch office" for all these offices. The Salt Lake City Office; the Honolulu Office; and the San Francisco.

Q And with respect to these offices, what are his responsibilities, what sort of matters would he become involved in?

A He becomes involved in assisting the managers to meet the requirements of clients; he becomes involved in the organization of the branch offices, sub-offices, etc., and he becomes involved in our sales programs and our general operation programs, not the details, perhaps, of the selling of a particular job or the operation of a particular guard job, but the general policies which we must follow in this operation.

Q In respect to labor relations, employee treatment, [Tr. p. 193.] employee benefits, and matters like that, what role would he—

A He's consultative. He has a consultative role. If I have a labor problem, I consult with him on it. I might—I believe you mentioned wages there, did you?

Q Anything in which he becomes involved.

A I might set up a wage scale and discuss the applicability of a certain scale to the area, taking into consideration the overhead and operational costs and plant charges, etc. He interests himself, naturally, in the profits that my office makes and he discusses with me the plans he formulates to operate a profitable operation.

Q Does he have a policy making job?

A Yes, I think it's fair to say that he has a policy making job. He recommends policies to higher headquarters, all of us.

Q When you say "we", who are you talking about?

A I am talking about branch managers and the division managers.

Q What sort of matters would he participate in on a policy level?

A He would participate in the terms of union agreements. He would participate in a pricing decision, and not necessarily an individual pricing situation but an overall pricing situation in the area.

Q What about with respect to employee benefits, does he have any policy or any role that he plays in that?

[Tr. p. 194.] A Yes, he was in consultation with myself and we discussed health insurance programs, and I think you might say we had never had a health insurance program until he advanced to higher headquarters the desire that we have one, the feeling that we should have one.

Q What about other terms and conditions of employment, does he have any role, any policy making role with respect to that?

A Well, I think that he would have a policy making role in qualifications of employees.

Q Now, what's your area of responsibility?

A I am the manager of the Los Angeles Area, which encompasses all of Southern California south of the northern boundary of San Luis Obispo County, going directly east to the Nevada Border, I have Clark County in Nevada, and the entire State of Arizona south of the Mexican border is my southern boundary.

Q Now, on Respondent's Exhibit 2, there are boxes marked "Anaheim sub-office", "San Diego sub-office", "Phoenix sub-office", with lines directed to the box where your name appears; what does that mean?

A That means that I have the operational responsibility for those offices and the sub-offices' managers report to me on the operations in that area.

Q Where is the Phoenix sub-office located?

[Tr. p. 195.] A It's in Phoenix, Arizona, on North Central Avenue.

Q And the San Diego office?

A The San Diego office is on 19th Street in San Diego.

TRIAL EXAMINER: I don't think he is particularly concerned about the street address, just the State.

Q (By Mr. Swerdlow) The Anaheim office?

A The Anaheim office is in Anaheim.

Q Well, what's the function of the sub-offices?

A The sub-office, it's function is, the manager of the sub-office controls the supervision, he supervises the supervision, and sometimes ever the job of the guard operations in his area. He employs the guards, he maintains the Burns policy in the operations on those jobs, and he has the overall supervision of the jobs in his area.

MR. SWERDLOW: Will you mark this for identification? This will be Respondent's next in number for identification.

(Document referred to above was marked Respondent's Exhibit No. 3 for identification.)

Q (By Mr. Swerdlow) Now, I am going to show you a copy of Respondent's Exhibit No. 3; now, the only difference between this and the actual copy is the hash marks and the Anaheim area marked red. First tell me, who prepared Respondent's Exhibit No. 3?

A I prepared Respondent's Exhibit No. 3 myself—

Q And—

[Tr. p. 196.] A —I ran out of red ink, though.

Q (laughs) What does Respondent's No. 3 indicate?

A Respondent's No. 3 indicates the area in the Metropolitan Los Angeles area, the responsibilities of the various offices and sub-offices; in other words, it shows the Anaheim sub-office area, which is Orange County, it shows a part of the Los Angeles office area, which is Los Angeles County and north and west of Los Angeles County, Ventura County, and it shows the major portions of Riverside County and San Bernardino County, and that part of Los Angeles County that is under the operational control of the Ontario sub-office.

Q Now, there is a blue circle?

A That happens to show the Ontario City where the Ontario office is located, to draw our attention to the Ontario.

Q Now, there is a dark line down the middle, I think this is the—

A That is the eastern border of the Ontario—pardon me, the western border of the Ontario sub-office.

Q And everything—

A Everything east of that line and north of that line, which is a line in red, black and blue, to show the difference between that and the county lines, to show the western border and southern border of the Ontario sub-office jurisdiction.

Q How is the jurisdiction of the L. A. sub-office?

A In the L.A. sub-office, is divided by a red, black and [Tr. p. 197.] blue line which divides it from the Ontario office and a blue and red line which divides it from the Anaheim office, with the Anaheim sub-office designated by squares overlaid over the map.

Q I see, and in which direction from the Ontario—

TRIAL EXAMINER: Let the record that the original of Respondent's No. 3 doesn't have those squares, but it's plain to—oh, I see, the blue squares. (witness indicated)

A I said, I ran out of red ink.

TRIAL EXAMINER: All right, fine.

Q (By Mr. Swerdlow) And from the Ontario sub-office area, what direction do you go to the L.A. sub-office area?

A From the Ontario, you go straight west to the L.A. sub-office area.

Q Now, is the L. A. County line indicated here?

A The L. A. County line is indicated on the map, although it may not be—

TRIAL EXAMINER: Well, let's see, here are Los Angeles and San Bernardino.

THE WITNESS: That's right, that is the L. A. County line. That line is indicated, yes.

Q The L. A. County line is indicated on these?

A Well, it's indicated on all of them; it just happens to be heavier on this.

Q Fine; now does part of the terrirtory of the Los Angeles [Tr. p. 198.] sub-office fall in—well, let me ask a question, is all of the territory of the Los Angeles sub-office in Los Angeles County in the Los Angeles City area?

A No, we—

MR. GREGORY: Won't the exhibit speak for itself, the document, Mr. Trial Examiner?

TRIAL EXAMINER: Well, there may be an explanation for it is in order, I don't know, I hope we are not going to waste an awful lot of time on this.

MR. SWERDLOW: I'm just about finished.

THE WITNESS: The Los Angeles office has jurisdiction in Kern County and in Ventura County, the counties to the north and the west.

Q (By Mr. Swerdlow) What about to the east?

A To the east, the Los Angeles sub-office jurisdiction does not go to the eastern boundary of the Los Angeles County line.

Q What about the Ontario office?

A The Ontario office contains a portion of the Los Angeles area.

Q Los Angeles County?

A Los Angeles County. The Ontario office contains a portion of Los Angeles County.

TRIAL EXAMINER: Have you concluded with this map?

MR. SWERDLOW: Yes, I offer it in evidence as Respondent's No. 3.

[Tr. p. 199.] TRIAL EXAMINER: Any objections?

MR. GOLDMAN: Well, just one point of clarification. On this chart, you have Los Angeles Branch; you are referring to something in the Los Angeles sub-office; is there a Los Angeles sub-office on this chart?

THE WITNESS: There is a section of the Los Angeles Branch office that has the same function as a sub-office, that's the operational part of the branch office, as distinct from the administrative part that has jurisdiction over the sub-office.

TRIAL EXAMINER: There is not only a Los Angeles Branch Office; there is also a Los Angeles sub-office?

THE WITNESS: Within the Los Angeles Branch Office.

TRIAL EXAMINER: Within the Los Angeles Branch Office; it is under the Los Angeles Branch Office the same as San Diego, Phoenix, etc.?

THE WITNESS: Exactly.

TRIAL EXAMINER: Without objection, it is received in evidence.

(Document above-referred to marked Respondent's Exhibit No. 3 for identification was received in evidence.)

[Tr. p. 201.]

ARTHUR C. POTTER

was recalled as a witness by and on behalf of the General Counsel and, having been previously duly sworn, was examined and testified further as follows:

TRIAL EXAMINER: Mr. Potter, would you please be seated. You have already been duly sworn, and you recognize that you are still under oath?

THE WITNESS: Yes, sir.

DIRECT EXAMINATION

Q (By Mr. Goldman) Where is the Wackenhut Corporation incorporated?

A It is incorporated in the State of Florida.

Q What services does the Wackenhut Corporation perform?

A General security services involving furnishing of [Tr. p. 202.] uniformed guards, performing investigations, conducting surveys, and we also perform functions in connection with alarm and electronics work.

TRIAL EXAMINER: General plant protection?

THE WITNESS: Yes.

Q (By Mr. Goldman) Where do you perform these services?

A In the majority of the States of the United States and in portions of South America.

Q Do you also perform them in Puerto Rico?

A Yes.

Q (By Mr. Goldman) In the course and conduct of Wackenhut's business operations, what is the, approximately, the annual gross volume of business in dollar amount of Wackenhut?

THE WITNESS: The gross volume of business for last year was, as I recall, in the neighborhood of 27 million dollars.

TRIAL EXAMINER: About approximately how much is done outside the State of Florida?

THE WITNESS: I would not have any knowledge of that.

[Tr. p. 203.] TRIAL EXAMINER: Would you say whether it was or was not in excess of fifty thousand dollars?

THE WITNESS: I would say it's in excess of fifty thousand dollars.

TRIAL EXAMINER: Done outside the State of Florida?

THE WITNESS: Yes, sir.

Q (By Mr. Goldman) Approximately how much of that is done in the State of California?

A Over $50,000.00.

Q In the State of California?

A Grossed in the State of California.

TRIAL EXAMINER: Over $50,000.00 developed and grossed in the State of California?

THE WITNESS: Yes, sir.

MR. GOLDMAN: I have no further questions.

TRIAL EXAMINER: Any cross examination?

MR. GREGORY: I have one. Does Wackenhut supply services to the United States Government Agencies?

THE WITNESS: Yes.

MR. GREGORY: What agencies?

THE WITNESS: To the Atomic Energy Commission and N.A.S.A.

MR. GREGORY: Are those facilities located throughout the United States?

THE WITNESS: In various areas of the United States, yes, sir.

[Tr. p. 204.] MR. GREGORY: But not all are located in Florida, is that correct?

THE WITNESS: No.

[Tr. p. 205.] J. FORREST INGLE

was recalled as a witness by and on behalf of the Respondent and, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION (continued)

Q (By Mr. Swerdlow) Mr. Ingle, in your testimony earlier this morning, you described the general operation of the Los Angeles Branch; would you describe specifically what your duties are in this branch?

A My duties are the general administration of the branch, employment of staff personnel, the setting of working conditions on the job, the supervision of the employment and training of guards, setting of the wages, industrial relations, negotiations, and the general overall supervision of all of our operations.

Q In what territory?

TRIAL EXAMINER: In the Los Angeles Branch.

THE WITNESS: That territory which is Southern California, south side of Nevada and Arizona.

Q (By Mr. Swerdlow) You have the Ontario sub-office on Respondent's No. 2, which I will give a copy back to you [Tr. p. 206.] now; it is indicated the Ontario sub-office, Mr. Parks is manager?

A Ralph E. Parks is now manager.

Q Would you describe generally what the responsibility is in the Ontario sub-office?

A The Ontario sub-office has the local supervision of all of our operations in San Bernardino, Riverside County, and the eastern portion of Los Angeles County. It has the establishment of our personnel on the guard jobs there, maintenance of our operational policy on the guard jobs.

Q Now, does this office establish policy?

A No, this office does not establish policy, it might recommend some to me, but it doesn't establish it.

Q Now, what is Mr. Parks responsibility in the sub-office?

A Mr. Parks responsibility is to coordinate the endeavors of the field supervisors in the area to see that they keep the jobs manned and the posts filled on the jobs, that the level of operations meets the standards of the Burns' established policy.

Q With respect to employee actions, that you discipline, granting leave of absence, what is Mr. Parks' responsibility?

MR. GREGORY: Objection, leading.

TRIAL EXAMINER: Overruled.

THE WITNESS: Mr. Parks has the authority and responsibility for disciplinary actions, employment, discharge and [Tr. p. 207.] vacations earned according to policy.

Q Now, does he establish policy with regard to any of these matters in the Ontario area?

A No, I establish that policy.

Q Now, with respect to discharge, does he have to report, does he or does he not have to report to you before taking disciplinary action?

A No, he doesn't report to me; he reports disciplinary actions, but he doesn't report them before the fact, he reports them after the fact.

Q With respect to promotions, what is his authority?

A He has authority to promote up to the grade of field supervisor in those areas if vacancies exist.

Q Now, does he participate in the hiring of employees?

A Oh, yes, he would certainly participate in the hiring of anyone of the level of the supervisor in the area. He has the overall responsibility for employing the guards; however, he may not physically accomplish that himself. It may be accomplished under his direction.

Q Now, confining ourselves to the area covered by the Anaheim office, Los Angeles—pardon me, sub-office, Los Angeles sub-office, and Ontario sub-office, how many guards are there in that area.

A I have them written down on a slip of paper which I handed you. I don't exactly recall, but it's somewhat less [Tr. p. 208.] than 800, between seven and eight hundred guards.

Q Now, in this area, I want to take this sub-office by sub-office, how many contracts for providing guard service does Burns have in the Los Angeles area?

A Approximately 130.

Q How many contracts does it have in the Ontario area?

A I believe it's exactly, as of last week when I looked it up, 31, that's approximately, somewhat over 30.

Q And what about in the Anaheim area?

A I think probably 17.

Q Now, in what area is the Lockheed job?

A That is in the Ontario sub-office area.

Q Now, in that office, on the chart, indicates George Goddard, Operations Supervisor, that's on Respondent's No. 2; would you describe Mr. Goddard's duties?

A Mr. Goddard is operations supervisor, and he is the assistant to the manager, he is the principal assistant to the manager, and has supervision over the field supervisors. It's his responsibility to insure that the field supervisors and where job supervisors exist, that the job supervisor has sufficient man power to man their jobs, that they schedule the man power to fill the posts, that the men are properly uniformed and perform according to Burns' policy on the job.

Q Now, how many jobs does Mr. Goddard supervise?

A Well, he, in effect, would have opportunity and [Tr. p. 209.] responsibility to supervise all of the jobs in the Ontario area, which is a figure over 30. Of course, he details the supervision of some of the jobs to the field supervisors and he may not directly concern himself with one or two particular jobs, that he knows from reports by the field supervisors is being handled properly and received no complaints from the client, but the job is supervised under his general direction.

Q And about what percentage of Mr. Goddard's time is spent with regard to the Lockheed job?

A I would say at least one-third of his time is spent with the Lockheed job, it being the principal, it being the largest job in his area.

Q Now, does he spend time with jobs that are located in Los Angeles County?

A Oh, yes, he spends considerable time with jobs—if he spends one-third, and I estimate it one-third on the Ontario job, he would probably spend at least that much, perhaps a little more on the job in the eastern part of Los Angeles County because of the nature of those jobs.

Q Now, underneath Major Goddard—or Mr. Goddard, in the Ontario sub-office, what is the title of the next level of supervisory personnel?

A The next level of supervisory personnel is field supervisor, of which there are three in that sub-office. [Tr. p. 210.] Q What are their functions?

A Their functions are to visit each job in their assigned area, to observe the performance of the guards on the job, to insure company standards of service are maintained.

Q Now, does Mr. Goddard have any authority with respect to firing employees?

A Yes, Mr. Goddard concerns himself with hiring in the Ontario area; he is in charge of hiring guard employees in the Ontario area.

Q When you say the Ontario—

A I mean the Ontario sub-office area.

Q Now, what about with respect to firing of employees; does Mr. Goddard have any authority with respect to that?

A Oh, yes, if he, if it comes to his attention, of misbehavior of a guard on his post, he not only has the authority but is required to take immediate action to remove the guard and discipline him by termination or by other action, by suspension or whatever.

Q Now, what about the area supervisors; what is the name of the area supervisor assigned to cover the Lockheed job?

A The Lockheed job is not specifically covered by one area supervisor for the reason that it is specifically covered by a job supervisor, and for the further reason that the area supervisors work in shifts, and any area supervisor who may be on duty might have the necessity of looking into any [Tr. p. 211.] situation that arises on the Lockheed job.

Q And when an area supervisor is on duty, does he pay attention to other jobs besides Lockheed?

A Oh, yes, pays attention to all the jobs; to explain that to you, we have a communications system where every job, a guard on every job calls in to a central office once per hour. If there is anything wrong on the job, if there is any guard that has not shown up, or if there is any matter that needs the attention of the supervisor, it would come to the supervisor over a radio network from the telephone office.

Q Now, who are the area supervisors?

A We have one area, Captain Kretzlow, Holzman, and there is one area supervisor job vacant at this particular moment; Lieutenant Saxon just resigned; his predecessor was Lieutenant Smith.

Q Now, let me ask you, just when was the Ontario sub-office established?

A Established in January.

Q Of what year?

A 1967.

Q Was this before or after you bid for the Lockheed job?

A Before we bid for the Lockheed job.

Q Now, Captain Kretzlow, how long has he been, approximately how long has he been a Burns' employee? [Tr. p. 212.] A I would say he has been a Burns' employee approximately four years.

Q Approximately how long has he been performing his present job?

A He's been field supervisor approximately two years.

Q What about Lieutenant Holzman, how long has he been employed by the Burns Company?

A Frankly, I can't give you that information. He has been a supervisor approximately eight months. Before that he was a guard, and I think he was a guard something like a year and a half, but that is subject to correction.

Q He was supervisor eight months, from when to when?

TRIAL EXAMINER: Eight months going back from today.

THE WITNESS: From eight months ago.

Q And Lieutenant Holzman?

A I think you just mentioned him.

Q Yes, I just asked you about him. What about Mr. Parks, how long has he been employed by Burns?

A Mr. Parks has been employed by the Burns Agency approximately a year. Before that, he was employed by the company that we acquired by purchase.

Q What about Mr. Goddard, how long has he been employed by Burns?

A Mr. Goddard had been supervisor for approximately three years; before that, he was a guard for us for approximately [Tr. p. 213.] one to two years.

Q How long has he been in his present job?

A In his present job as operations manager, he has been since we established the Ontario sub-office in January.

Q Now, there is one opening for an area supervisor.

A Yes.

Q Do you have any plans to fill that job?

TRIAL EXAMINER: What difference does it possibly make, are you going to ask the names of the applicants, too? What difference does it make?

MR. SWERDLOW: It does make a difference.

TRIAL EXAMINER: All right. Go ahead.

THE WITNESS: We certainly intend to fill the vacancy, and Mr. Parks is actively examining the job supervisors in the area of promotion.

Q (By Mr. Swerdlow) In the area?

A In the area, Ontario sub-office.

Q Now, who is the highest supervisor on the job at Lockheed?

A Captain Bagby is the Job Supervisor.

Q How long has he been a Burns' employee?

A Since July 1, 1967.

Q Where did he work before that?

A He worked on that job for Wackenhut as sergeant.

Q What was his present rank?

[Tr. p. 214.] A Captain.

Q Are there any other supervisors, job supervisors, on the Lockheed job, including the sergeant as being a supervisor?

A He is the only resident supervisor on the job.

Q Now, what is his function?

A His function is to schedule the guards on his job, to see that every post is filled, to see that the guards perform in accordance with Burns' standards, and to confer with the client daily to see that we are performing according to their satisfaction.

Q Does he have authority to hire employees?

A No, he requisitions employees from the Ontario office; however, if he had the opportunity to hire a per-

son, he would send him to the sub-offices to be hired. His recommendations would be accepted.

Q On hiring?

A Yes, on hiring.

Q What about on discharging employees; does he have authority to discharge?

A Certainly, if a guard performs an act that is proven to be subject to discharge, it's expected that Captain Bagby would take immediate action and report it to the office, the Burns' office, now.

Q When is the action effective?

[Tr. p. 215.] A Captain Bagby is authorized to take a guard off duty immediately.

Q Is he authorized to discharge a guard if need be?

A Yes, sir.

Q Now, the employees, with respect to the employees in the Los Angeles Branch area, do they have the same or different benefits, with respect to vacations—

MR. GREGORY: Object, calls for conclusion.

TRIAL EXAMINER: Overruled.

THE WITNESS: All the guards under the jurisdiction of the Los Angeles Branch office, except the guards in Arizona, have the same pay scales, vacations, working conditions, fringe benefits.

Q (By Mr. Swerdlow) What about hospitalization?

A All guards in the employ of the agency for more than 12 months are under the hospitalization plan.

Q The same plan?

A The same for all, the same terms.

Q Now, what about disciplinary procedure?

A Disciplinary procedures are the same.

Q Where is the basic recruiting of guards handled?

A The basic recruiting is handled at the Los Angeles Branch office personnel offices there, and recruiters there, and we advertise continuously for guards, and they come to our office to make application. They also, however, the [Tr. p. 216.] ad directs them also to our Anaheim office and to our Ontario office, so they are hired at both these offices at the same time. Our recruiters, our outside recruiters work outside of the Los Angeles Branch office, but they travel to the sub-office areas, to State Employment

offices in the area, to recruit sufficient numbers of guards so that we can have enough guards on hand.

Q Is there a personnel manager in your area?

A Yes, there is a personnel manager in the Los Angeles Branch office.

Q What are his functions?

A To keep the personnel records, to make the background investigations of guard applicants, he oversees guard training division. We have class room training as part of the employment process. And he also has duty as terminal interviewer with guards who are terminated for any reason or resignation or disciplinary reasons.

Q Guards from what area are we talking about?

A We are talking about guards from all areas under the Los Angeles Branch office.

Q Where are the personnel records for those guards kept?

A Master personnel records in the Los Angeles Branch office; however, for the guards in the Los Angeles, duplicate personnel jackets, copies of documents kept there.

Q Are personnel records kept on the Lockheed job?

[Tr. p. 217.] A No, not on the Lockheed job, personnel records for the Lockheed job are kept at the Ontario suboffice, and master copies are in the Los Angeles Branch Office.

Q Now, on some of the jobs, it is necessary for employees to get security clearance?

A Yes.

Q In what office are the security clearances processed?

A Under the general direction of the Director of Personnel, manager of personnel, personnel manager in the Los Angeles office. We have a security officer who is charged with the preparation of the forms. The guards are furnished a form to complete in their own handwriting by their job supervisor or by their area supervisor who collects the completed forms and sends them into the Los Angeles office where they are typed, the voluminous number of copies that the federal government requires, returned to the area supervisor or field supervisor to obtain the signature of the guards and to obtain the necessary fingerprint cards that go with them. They are

then return to Los Angeles office and forwarded to the contract—defense management contract office in Dayton, Ohio, where they are processed by the federal government.

Q This is the process for guards in what area?

A All areas except the Phoenix sub-office. The Phoenix sub-office, they handle all the processing I just described in their own area.

[Tr. p. 218.] Q Now, where are the uniforms kept for the employees, for the guard employees in the Los Angeles Branch Office?

A They are purchased by the personnel office, and in the Los Angeles area and nearby areas of Orange County and San Bernardino and Riverside Counties a guard employee is sent to our uniform supplier on Main Street. They can go there and receive new uniforms when they are sent by the personnel office. We keep a supply in our office, however. In case of new hires, we can outfit them with uniforms.

Q And when you say every office?

A I mean the branch office and sub-offices.

Q Are there uniforms kept on the Lockheed job?

A No, there are no uniforms kept on the Lockheed job. The uniforms are kept at the Lockheed International Office, Terminal Building, the sub-office, which is five minutes from the Lockheed job.

Q Now, where are supplies that are used on the job other than uniforms?

A Purchased by the Los Angeles Branch office and furnished on requisition to the sub-offices, to a job by the job supervisor. A remote job like, for example, in Blythe, we would furnish supplies directly to a job.

Q Now, is there any clerical and office work in connection with the Lockheed job?

A Only prepartaion of time sheets, assume you would call [Tr. p. 219.] clerical, done by Captain Bagby.

Q Where is that done?

A On the job.

Q Where are the employees paid from, the employees of the Los Angeles Branch area paid from?

A Paid from the Los Angeles Branch office, prepared in the office, the checks are, and mailed to the homes of

the guards. There are exceptions to that. Sometimes they are mailed to the job supervisors who distributes them on the job.

Q Do the employees, does Burns have an employees' hand book?

A Burns does have an employee hand book.

MR. SWERDLOW: Would you please mark that Respondent's 4.

(Document above-referred to marked Respondent's Exhibit No. 4 for identification.)

TRIAL EXAMINER: Excuse me for a moment. It just happens to be on my mind, Mr. Goldman, is there in evidence the contract between Respondent Burns and Lockheed?

MR. GOLDMAN: Burns and Lockheed?

TRIAL EXAMINER: I believe that was in evidence?

MR. GOLDMAN: Yes.

TRIAL EXAMINER: Is there in evidence the contract between Burns and the union?

MR. GOLDMAN: Between Burns and the union? There is no contract betwen Burns and American Federation of Guards right [Tr. p. 220.] now.

TRIAL EXAMINER: What about UPG, there is no contract?

MR. GOLDMAN: There was a contract between Wackenhut and United Plant Guard Workers, which is in evidence, in stipulation. There has been no contract between Burns and United Plant Guard Workers, nor for that matter, any contract with American Federation of Guards.

MR. SWERDLOW: Covering this facility.

TRIAL EXAMINER: That's what I mean, Lockheed.

Q (By Mr. Swerdlow) I am going to hand you a copy of Respondent's Exhibit No. 4.

TRIAL EXAMINER: That's a handbook for guards, isn't it?

THE WITNESS: That is a "Handbook for Guards," Burns Detective Agency.

Q (By Mr. Swerdlow) How long has that particular handbook been used?

A Since 1962.

Q Who gets copies of this handbook?

A Each guard must be given a copy of this handbook upon employment, and it is supposed to be retained in his possession on the job as long as he is employed.

Q And were copies of the handbook given to employees in the Los Angeles Branch area?

A They certainly are; they are given to every guard employee.

[Tr. p. 221.] Q What's the purpose of the handbook and how is it used?

A This handbook is the guard's general orders. We consider that the two types of orders, the general orders that apply to all guards and special orders that apply to a job. The handbooks for guards is equal to the general orders for the military.

MR. SWERDLOW: I move Respondent's 4 to be entered into evidence.

TRIAL EXAMINER: All right. Any objections?

MR. GOLDMAN: No.

MR. GREGORY: No, sir.

TRIAL EXAMINER: Without objection, it is received in evidence.

(Document above-referred to marked Respondent's Exhibit No. 4 for identification was received in evidence.)

Q (By Mr. Swerdlow) Does Burns transfer employees from one job to another on either a temporary or permanent basis?

A Daily, transfers are made daily.

Q Let's talk for a minute about temporary transfers; how frequent do temporary transfers take place in the Los Angeles Branch area, of Burns guards from one job to another job?

A Well, there are several made daily. I would say that there must be probably at least one hundred weekly, of a temporary transfer, temporary transfers being transfers to [Tr. p. 222.] a post, maybe a guard hasn't show up, is sick.

Q Well, what about permanent transfers of employees; about how many permanent transfers of employees,

transferring an employee from one Burns' job to another Burns' job?

A Oh, we have at least one a day, and, many times, more than one a day. I would imagine we have five to six hundred a year of such transfers.

Q Now, do you transfer employees to or from top security jobs?

A Let's—may I make a statement concerning what we mean by top security. The federal government clears certain areas top secret, which is top security; as secret, which is secret; and confidential, which is of a secret nature. So, if we are referring to top secret as top security, the approximate requirements on the Ontario job of Lockheed Aircraft, are requirements of not more than five top secret men required. The rest of them are secret. We have many, many, jobs that require secret clearance, while we have only the one job at Lockheed that requires top secret clearance.

Q I see. Well, let me ask the question this way. Do you transfer people about secret jobs, from one secret job to another secret job?

A We have to make many transfers in secret jobs. Only persons who have had a secret—a security clearance to the level of secret can be assigned to a job requiring that, and [Tr. p. 223.] not all guards have it. It takes a time to get it. We have to train, we have to employ and train and keep on a non clearance job guards while we are getting their clearances, which, of course, was our purpose when we started out, to transfer them to a secret cleared job. Practically any guard who is on a secret cleared job has been transferred from another job.

Q How many secret cleared jobs are there in the Los Angeles Branch area?

A Secret cleared men, about how many requirements for secret cleared men? We have a requirement for about approximately 225 secret cleared men.

Q Now, in making transfers from one Burns job to another, what consideration is given, if any, to the boundarylines that were indicated on Respondent's Number 3 between the Los Angeles office and the Anaheim office or between any of the offices?

A Given consideration to the boundary lines when transferring from one sub-office area to another, just simply because it's a sub-office area, no consideration is given. We are considering the comfort of the men. We consider his responsibilities, whether he can move or not. We consider the man more than we consider the location of the job. If the man can go where we have a requirement, then we send him. It's not unusual for us to send a man from Los Angeles to [Tr. p. 224.] Ontario or to Anaheim or to San Diego, for that matter.

Q The record indicates you transferred to date approximately 23 former Burns employees from other jobs to the Lockheed job; from where did these employees come?

A They came from various jobs in the eastern area of Los Angeles County, some from jobs in the city of Los Angeles, some from Orange County. We have 23 men there who have been transferred from other jobs, but we transferred more in and out than that figure shows.

Q Now, how far is the Lockheed job from the Los Angeles County line?

A Approximately nine miles from the nearest Los Angeles job; from the county line, probably six miles.

Q It's about nine miles from your nearest job?

A Right.

Q Now, did Burns recognize the American Federation of Guards as the bargaining representative for the employees of the Lockheed job?

A I did, yes.

Q And can you tell us when you recognized them?

A I believe it was the 29th day of June.

Q And where, or could you describe the circumstances regarding this recognition?

A Yes, the representative of the American Federation of Guards came to my office. He called me up and asked me if he [Tr. p. 225.] could come to see me, and I—

TRIAL EXAMINER: Who was this?

THE WITNESS: Mr. Ronald Wells. He was the business representative of the American Federation of Guards, and I believe he is secretary-treasurer.

Q (By Mr. Swerdlow) When did he call you?

A He called me the morning of the 29th of June and asked me if he could come around and see me. Bearing in mind that we have a contract with him for covering guards in the Los Angeles area, I see him frequently and told him to come on around.

MR. GREGORY: May I object to the witness' editorializing and ask that the answer be stricken?

TRIAL EXAMINER: The answer may remain; the objection is overruled.

You say you had contracts in the Los Angeles area; did you have one or more than one contract?

THE WITNESS: One.

TRIAL EXAMINER: One contract, covering all of your employees?

THE WITNESS: All the employees in the Los Angeles County.

TRIAL EXAMINER: And in the Los Angeles Branch or just Los Angeles County?

THE WITNESS: Los Angeles County.

[Tr. p. 226.] TRIAL EXAMINER: In Los Angeles County you had a contract?

THE WITNESS: That's right.

TRIAL EXAMINER: Did you have a contract in San Bernardino County?

THE WITNESS: No, sir.

TRIAL EXAMINER: Proceed, counsel.

Q (By Mr. Swerdlow) Will you continue describing what happened on the 29th of June. You told us about the phone call from Mr. Wells—

A Mr. Wells came to my office and presented to me 27 applications of guards or 27 applications completed by men he stated we had employed for work at the Lockheed Aircraft Services Company.

Q I am going to show you a copy of General Counsel's Exhibit No. 4, and you can tell me if that is the form of a pledge card that was shown to you by Mr. Wells?

A That's the form.

Q He showed you 27 pledge cards?

A 27 cards. I called the personnel offices and asked for the application forms, or asked for the personnel

records, to see if we had personnel records of the men who had purported to sign the forms and asked them to compare the signatures with the signatures on our applications, and I found that those forms were signed by the men that were purported to have signed them, that is, the signature compared with the [Tr. p. 227.] signature on the application. So, I said to Mr. Wells, "Do you have any more applications?" He said, "No, but I have approximately eight members that you are transferring to this job who have told me that you have assigned them to this job. They are already members and have been working in Los Angeles County." Which indicated that about 35 persons out of the expected 42 to be assigned there were already members of AFG or had signed a pledge card, and on that basis, I said to Mr. Wells, "I don't see that I can do anything except recognize it." And that is that.

Q (By Mr. Swerdlow) How many employees were there at the Lockheed job at the time?

A At the time we hadn't started to work, frankly, we were to start work the next day but one, in other words, two days later we were to start work, 1st of July, and we had an order to start with 42 men.

Q Now, those applications, what dates were they, were those people who were on the applications, they had been hired or were they not?

A They had been hired. They had been hired in that they had agreed to come to work and we had agreed to furnish them work.

Q Now, you heard the testimony here from General Counsel's witness?

A Yes.

[Tr. p. 228.] Q At the time you met with Mr. Wells, were you aware of the purported activity of Mr. New and Mr. Goddard?

MR. GREGORY: Objection—

THE WITNESS: I was aware that Mr. New and Mr. Goddard had been recruiting for the Lockheed job. I was aware that Mr. Foley had been at the Lockheed International Airport simply to organize the men. I wasn't aware of some of the statements such as were

made by the men. I wasn't aware that Mr. Foley had told the men that they had to join the union to work.

TRIAL EXAMINER: Did you give Mr. Foley permission to recruit on the job?

THE WITNESS: No, sir, because Mr. Foley didn't recruit on the job.

TRIAL EXAMINER: I see.

Q (By Mr. Swerdlow) Now, did Burns have a policy with respect to the rank of employee who was on a post that is covered for 24 hours?

A In any remote post that has 24 hours coverage, we always, on every job provide that the day man has the rank of a sergeant.

Q Do you know if Mr. Reitzel is working on such a post?

A It's my understanding that he is. I haven't been on his post, but it is my understanding that its away from, on the other side of the compound from the Captain's office.

[Tr. p. 229.] CROSS EXAMINATION

Q (By Mr. Goldman) Mr. Ingle, when Burns is about to bid on a contract for new guard services within your area, are you notified of this?

A Yes.

Q Do you play an active part in this?

A I sign the bid.

Q You sign the bid; do you attend bid conferences?

A Sometimes I do, and sometimes I don't.

Q In a job with a magnitude of 42 people involving top security clearance, do you normally attend such a pre-bid conference?

A I didn't attend this one. I don't think that there is such a thing as normally attending a conference of a job this size. This is an unusual job. It stands in a class by itself.

TRIAL EXAMINER: All right. You didn't attend this conference?

[Tr. p. 230.] THE WITNESS: I didn't attend.

Q (By Mr. Goldman) Who did attend this conference, this pre-bid conference?

THE WITNESS: The salesman in the area. His name is B. G. Ostling.

Q (By Mr. Goldman) Did Mr. Osling report directly to you?

A He reports directly to my assistant, and to me, as well.

Q Your assistant is Mr. New?

A No, not in this case. My assistant in sales is Mr. Cocher, C-O-C-H-E-R.

TRIAL EXAMINER: Who is Mr. New?

THE WITNESS: Mr. New is the operations manager of the Los Angeles sub-office, that's the part of the office that controls the guards in the Los Angeles County.

Q (By Mr. Goldman) A job of this size dollar volume, don't you usually take an active interest in this type job?

A Yes, sir.

[Tr. p. 231.] Q (By Mr. Goldman) Were you notified prior to your bid for the Lockheed job that the Lockheed, or the former Wackenhut guards were currently represented by the United Plant Guard Workers of America?

A This was the labor agreement? I was aware of that.

Q And that Wackenhut and the union had just gone through a Board certication to see that the employees were certified in an appropriate unit?

[Tr. p. 232.] A I was aware of contract. I was made aware of it.

Q Were you aware of this when Mr. Wells came to your office and demanded recognition?

A I was aware of that sometime previously.

TRIAL EXAMINER: You were aware of it before the bid was made, weren't you?

THE WITNESS: Yes, I was aware of it before the bidding.

Q (Mr. Goldman) Now, in regard to your testimony in relation ot the uniform policies regarding the Los Angeles Branch Office, you made mention that the Phoenix sub-office in Arizona does not have the same uniform policy in relation to wages, I believe?

A They do not.

Q Is there anything else in that sub-office that differs from the other sub-offices?

A They may not have the same fringe benefits or same wages.

Q Now, when a person transfers from the Phoenix sub-office to one of the other sub-offices within the Los Angeles Branch, what wage rate is he getting?

A The wage rate which applies to the area which he transferred to.

[Tr. p. 233.] Q When Burns took over the job at Lockheed, was there any understanding between Burns and Lockheed that Burns would hire or retain all the former Wackenhut guards?

A No, sir.

Q Was there any policy on your part to try to hire all, the substantial number of the Wackenhut guards because of their secret clearance?

A Yes, was the plan; that is the plan sometimes for that.

Q The plan in this case was to try to hire as many of the Wackenhut guards that had secret and top secret clearances as would come over?

MR. SWERDLOW: I object, that's repetitive.

TRIAL EXAMINER: Overruled.

THE WITNESS: As many as we needed.

Q (By Mr. Goldman) And when did you determine this need?

A We determined the need early in June when we started examining our records to see how many men we could conveniently [Tr. p. 234.] assign there with secret clearances from other jobs.

TRIAL EXAMINER: You did agree, did you not, to recognize the American Federation of Guards, right, on June 29?

THE WITNESS: I did, sir.

TRIAL EXAMINER: All right, as the representative of what employees?

THE WITNESS: As the representative of the employees of Lockheed Aircraft Service.

TRIAL EXAMINER: But you never negotiated a contract?

THE WITNESS: Haven't negotiated.
TRIAL EXAMINER: Have you bargained?
THE WITNESS: I have not bargained. May I say that I was told that I recognized them in error.

[Tr. p. 239.] (Document above-referred to marked General Counsel's Exhibit No. 6 for identification was received in evidence.)

[Tr. p. 242.] REDIRECT EXAMINATION

Q (By Mr. Swerdlow) Now, when you met with Mr. Wells, was there any discussion as to the terms and conditions as that would be applied to the employees at Lockheed?

A He had asked for a bargaining meeting. I reported that fact to my higher headquarters and was told not to meet in bargaining without further notice, that it was under consideration.

MR. SWERDLOW: I have no further questions.
TRIAL EXAMINER: All right. Nothing further?
MR. GOLDMAN: Nothing further.
MR. GREGORY: Just one, if I may.

RECROSS EXAMINATION

Q (By Mr. Gregory) Mr. Ingle, you testified earlier you had no discussion with Mr. Wells about negotiations; now, you tell us he did ask you to agree to bargain with him, is that right?

A He suggested that we meet later for bargaining. I had no negotiations with him.

Q Did he make a demand upon you that you apply the contract that has been identified as General Counsel's Exhibit No. 6 to the Lockheed facility?

[Tr. p. 243.] A I don't know if he made a demand; he mentioned that he would like to extend that contract.

Q Do you know whether or not the employees at the Lockheed facility were asked to ratify an agreement, being General Counsel's Exhibit No. 6 for that facility?

A I have heard so, I know nothing about it.

Q Did you also hear that the employees overwhelmingly rejected that contract?

THE WITNESS: I have no details about this.

Q (By Mr. Gregory) Do you know whether or not they rejected it?

A I understand so.

Q Can you tell us why you placed employee wages at Lockheed at $1.60 an hour and subsequently raised them to $1.75 an hour and then paid wages retroactively until July 6?

A Yes.

Q Why did that happen?

A Because when we took over the contract, we decided that we would not allow the employees to lose anything on their present wages. It was represented to me that they were receiving $1.60 an hour, so I said we would pay them $1.60 an hour. It was later represented to me that they would receive $1.75 an hour, and for economic reasons I raised them to $1.75 an hour.

[Tr. p. 244.] Q And is it your testimony that it was a mistake then that they were paid $1.60?

A No, it was not a mistake—

Q It was a misunderstanding you did that?

A It was a misunderstanding.

Q The filing of the charges in this matter by the union, you had no part in it?

A Certainly not.

GENERAL COUNSEL'S EXHIBIT No. 1(e)

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 31

Case No. 31-CA-776

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.

and

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162

and

AMERICAN FEDERATION OF GUARDS, LOCAL 1, PARTY IN INTEREST

COMPLAINT AND NOTICE OF HEARING

It having been charged by International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162, herein called UPGWA, that The William J. Burns International Detective Agency, Inc., herein called Burns, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing, and alleges as follows:

1. (a) The original charge was filed by UPGWA on July 24, 1967, and a copy was served on Respondent by registered mail on July 24, 1967.

(b) The amended charge was filed by UPGWA on August 1, 1967, and copies were served on Respondent and on American Federation of [illegible]rds, Local 1, herein called AFG, by registered mail on August 1, 1967.

2. (a) Respondent is, and has been at all times material herein, a New York corporation with offices in various states of the United States, including an office at Los Angeles, California, where it is engaged in providing protective, guard, and detective services to business firms throughout the United States.

(b) In the course and conduct of its business operations, Respondent's Los Angeles office enjoys an annual volume of business in excess of $500,000, annually performs services valued in excess of $50,000 for firms outside the State of California, and annually performs services valued in excess of $50,000 for firms in the Los Angeles, California, area, each of which annually ships products valued in excess of $50,000 directly outside the State of California.

(c) The Wackenhut Corporation, herein called Wackenhut, is a Florida corporation engaged in plant protection and/or security services for firms located throughout the United States. In the course and conduct of its business operations, Wackenhut has an annual gross volume of business in excess of $500,000, and it annually performs services valued in excess of $50,000, outside the State of Florida.

3. Respondent and Wackenhut each is, and at all times material herein has been, an employer engaged in commerce and in a business affecting commerce, within the meaning of Section 2(6) and (7) of the Act.

4. The UPGWA and AFG each is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

5. (a) Wackenhut, prior to July 1, 1967, performed plant protection and/or security services for the Lockheed Aircraft Service Company, Ontario International Airport, herein called Lockheed, located in Ontario, California.

(b) Since on or about July 1, 1967, Wackenhut has ceased to perform the plant protection services for

Lockheed, described above, and since on or about July 1, 1967, and at all times material herein, Respondent has performed said plant protection services for Lockheed at Lockheed's Ontario, California, plant, and has been engaged in substantially the same business operations formerly engaged in by Wackenhut, described above, and has employed substantially the same employees and supervisors as had been employed by Wackenhut. The Respondent's operations at Lockheed in Ontario, California, are the only operations involved in this proceeding.

(c) Respondent is, and has been since on or about July 1, 1967, the successor to Wackenhut in its operations described above.

6. At all times material herein, the following-named persons occupied positions set opposite their respective names and have been, and are now, agents of the Respondent, acting on its behalf, and are supervisors within the meaning of Section 2(11) of the Act:

J. F. Ingles	— Los Angeles Division Manager
W. C. New	— Assistant Manager, Plant Protection Department
_____ Goddard	— Guard Major
Owen Bagby	— Guard Captain
_____ Smith	— Guard Lieutenant
_____ Kietzlow	— Guard Captain

7. At all times material herein, at least until on or about June 30, 1967, all full-time and regular part-time employees of Wackenhut performing plant protection duties as determined in Section 9(b)(3) of the Act at the Lockheed Aircraft Service Company, Ontario International Airport; excluding office clerical employees, professional employees, supervisors, and all other employees as defined in the Act, constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

8. On or about February 28, 1967, a majority of the employees of Wackenhut, in the unit described above in

paragraph 7, by a secret ballot election conducted under the supervision of the Regional Director for the Thirty-first Region of the National Labor Relations Board, designated and selected the UPGWA as their representative for the purposes of collective bargaining with Wackenhut, and on or about March 8, 1967, said Regional Director certified the UPGWA as the exclusive collective-bargaining representative of the employees in said unit.

9. On or about April 29, 1967, Wackenhut and UPGWA entered into a collective-bargaining agreement, effective through April 28, 1970, and from year to year thereafter, if not amended, modified, or terminated, covering wages, hours, and working conditions of the employees in the unit described in paragraph 7 above.

10. Since on or about July 1, 1967, all full-time and regular part-time employees of the Respondent, performing plant protection duties as determined in Section 9 (b) (3) of the Act, at the Lockheed Aircraft Service Company, Ontario International Airport; excluding office clerical employees, professional employees, supervisors, and all other employees as defined in the Act, have constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

11. Since on or about July 1, 1967, the UPGWA has represented, and continues to represent, a majority of Respondent's employees in the unit described in paragraph 10 above, and, by virtue of Section 9(a) of the Act, is now, and has been at all times material herein, the exclusive representative of all employees in the said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

12. Since on or about July 1, 1967, and thereafter, and more particularly on July 12, 1967, UPGWA has requested, and continues to request, that Respondent bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, as the exclusive collective-bargaining representative of the employees of Respondent in the unit described in paragraph 10 above.

13. Since on or about July 1, 1967, and thereafter, and more patricularly on July 12, 1967, the UPGWA has requested, and is requesting, Respondent to honor and and give effect to the collective-bargaining agreement described in paragraph 9 above.

14. Since on or about July 12, 1967, and at all times thereafter, and more particularly on July 24, 1967, Respondent has refused, and continues to refuse, to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, with the UPGWA, as the exclusive collective-bargaining representative of its employees in the appropriate unit described in paragraph 10 above.

15. Since on or about July 12, 1967, and at all times thereafter, and more particularly on July 24, 1967, Respondent has rejected, and continues to reject, the UPGWA's request, described in paragraph 13 above, and has refused, and continues to refuse, to honor or give effect to the collective-bargaining agreement described in paragraph 9 above.

16. On or about July 1, 1967, Respondent unilaterally changed existing wage rates, hours of employment, overtime wage rates, differentials for swing shift and graveyard shift, and other terms and conditions of employment of the employees in the appropriate unit described in paragraph 10 above.

17. (a) At all times material herein, and more particularly since on or about June 1, 1967, Respondent and the AFG have entered into, performed, maintained, and otherwise given effect to an arrangement, understanding, or practice requiring membership in AFG as a condition of employment by Respondent at its Lockheed-Ontario operations, and said arrangement, understanding, or practice does not comply with the requirements of Section 8(a)(3) of the Act.

(b) Since on or about June 1, 1967, and continuing to date, Respondent has required, and is requiring, membership in or application for membership in AFG as a condition of employment at its Lockheed-Ontario operations.

18. On or about July 1, 1967, Respondent gave an employee a promotion and increase in rate of pay because said employee joined, assisted, and engaged in activity on behalf of the AFG.

19. Since on or about June 1, 1967, and continuing to date, Respondent, through its agents W. C. New, Major Goddard, Captain Owen R. Bagby, Lieutenant Smith, and Captain Kietzlow, has aided and assisted, and is aiding and assisting, AFG in solicitng Respondent's employees to join or become members of AFG and has aided and assisted AFG in collecting applications for membership in AFG from Respondent's employees.

20. On or about June 12, 1967, Major Goddard promised an employee a promotion and an increase in rate of pay because said employee joined, assisted, and engaged in activity on behalf of the AFG.

21. On or about June 29, 1967, Respondent extended recognition to AFG as the exclusive collective-bargaining representative of Respondent's employees in the unit described in paragraph 10 above, notwithstanding the fact that said union was not, has not been, and is not now, duly designated and selected as the representative for the purposes of collective bargaining by an uncoerced majority of the employees in said unit.

22. By the acts described in paragraphs 14, 15, and 16 above, and by each of said acts, Respondent did refuse to bargain collectively in good faith, and is refusing to bargain collectively in good faith, with the UPGWA as the exclusive representative of the employees in the appropriate unit described in paragraph 10 above, and did thereby engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(5) of the Act.

23. By the acts described in paragraphs 17 and 18 above, and by each of said acts, Respondent did discriminate, and is discriminating, in regard to hire or tenure or terms or conditions of employment of its employees, thereby encouraging membership in a labor organization, and Respondent thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(3) of the Act.

24. By the acts described in paragraphs 17, 18, 19, 20, and 21, above, and by each of said acts, Respondent did render, and is rendering, unlawful assistance and support to a labor organization, and thereby did engage in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(2) of the Act.

25. By the acts described in paragraphs 14 through 24 above, and by each of said acts, Respondent did interfere with, restrain, and coerce, and is interfering with, restraining, and coercing, its employees in the exercise of the rights guaranteed in Section 7 of the Act, and did thereby engage in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

26. The acts of Respondent described in paragraphs 14 through 25 above, occurring in connection with its operations described in paragraph 2 and 3 above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states, and have led, and tend to lead, to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

27. The acts and conduct of Respondent described in paragraphs 14 through 26 above, constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (2), (3), and (5), and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 28th day of November 1967, at 10 a.m., PST, in Room 920 (Hearing Room #1), Ninth Floor, Bartlett Building, 215 West Seventh Street, Los Angeles, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases as Taken from the Board's

Published Rules and Regulations and Statements of Procedure, is attached.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of an answer to said Complaint within 10 days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

DATED at Los Angeles, California, this 25th day of October 1967.

/s/ Paul A. Cassady
PAUL A. CASSADY
Regional Director
National Labor Relations Board
Region 31
10th Floor, Bartlett Building
215 West Seventh Street
Los Angeles, California 90014

GENERAL COUNSEL'S EXHIBIT No. 1(j)

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 31

Case No. 31-CA-776

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.

and

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162

and

AMERICAN FEDERATION OF GUARDS, LOCAL NO. 1, PARTY IN INTEREST

ANSWER OF RESPONDENT THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.

The William J. Burns International Detective Agency, Inc., Respondent herein, for its answer to the complaint in Case No. 31-CA-776 admits, denies and avers as follows:

1. Respondent admits paragraphs 1. (a) and 1. (b).

2. Respondent admits paragraphs 2. (b) and 2. (a), except Respondent specifically denies it is a New York corporation. And Respondent denies allegations in paragraph 2. (c), upon information sufficient to form a belief.

3. Respodnent admits paragraph 3., except Respondent denies allegations regarding Wackenhut, upon information sufficient to form a belief.

4. Respondent admits paragraph 4.

5. Respondent denies allegation of paragraph 5. (a), upon information sufficient to form a belief. And Respondent denies each and every allegation in paragraph 5. (b), except Respondent admits it is now performing plant protection services for Lockheed Aircraft Service Company at Ontario, California.

6. Respondent denies each and every allegation in paragraph 6., except Respondent admits the listed persons are in Respondent's employ, except reference to Hackelhurst, Guard Captain, about whom Respondent states it has no knowledge or information.

7. Respondent denies allegations of paragraph 7.

8. Respondent denies allegations of paragraph 8, upon information sufficient to form a belief.

9. Respondent denies allegations of paragraph 9, upon information sufficient to form a belief.

10. Respondent denies allegations of paragraph 10.

11. Respondent denies the allegations of paragraph 11.

12. Respondent denies each and every allegation of paragraph 12, except Respondent specifically admits UPGWA made alleged request on Respondent on July 12, 1967.

13. Respondent denies each and every allegation of paragraph 13., except Respondent specifically admits UPGWA made alleged request on Respondent on July 12, 1967.

14. Respondent denies each and every allegation of paragraph 14, except that Respondent admits it wrote a letter on July 24, 1967 setting forth its position.

15. Respondent denies each and every allegation of paragraph 15, except that Respondent admits it wrote a ltter on July 24, 1967 setting forth its position.

16. Respondent denies allegations of paragraph 16.

17. Respondent denies allegations of paragraph 17. (a) and (b).

18. Respondent denies allegations of paragraph 18.

19. Respondent denies allegations of paragraph 19, except that part referring to Hackelhurst, Guard Captain, about whom Respondent states it has no knowledge or information, as answered in paragraph 6. above.

20. Respondent denies allegations of paragraph 20.

21. Respondent denies each and every allegation of paragraph 21., except Respondent admits it recognized AFG o nJune 29, 1967 as exclusive collective-bargaining representative of Respondent's employees at Lockheed Aircraft Services, Ontario, California.

22. Respondent denies allegations of paragraph 22.

23. Respondent denies allegations of paragraph 23.

24. Respondent denies allegations of paragraph 24.

25. Respondent denies allegations of paragraph 25.

26. Respondent denies allegations of paragraph 26.

27. Respondent denies allegations of paragraph 27.

WHEREFORE, having fully answered, Respondent prays that an order be entered herein finding that in Case No. 31-CA-776 Respondent has at all times complied with the provisions of the Labor Management Relations Act, and that Respondent be found not to have been in violation of any of the provisions hereof as al-

leged in said Complaint, and that each and all of the complaints in said Complaint be dismissed.

/s/ John M. Geraty
JOHN M. GERATY
235 East 42nd Street
New York, New York
For the Respondent

I certify that copies of the foregoing were mailed to International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162, 14214 East Jefferson, Detroit, Michigan, and Livingston, Gregory, Van Lopik & Cranefield, Attorneys, for Union and American Federation of Guards, Local No. 1, 4157 West Fifth Street, Room 218, Los Angeles, California, this 13th day of November 1967.

/s/ John M. Geraty
For the Respondent

GENERAL COUNSEL'S EXHIBIT No. 1(k)

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 31

Case No. 31-CA-776

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.

and

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162

and

AMERICAN FEDERATION OF GUARDS, LOCAL 1, PARTY IN INTEREST

AMENDED ANSWER OF RESPONDENT THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.

The William J. Burns International Detective Agency, Inc., Respondent herein, for its answer to the complaint in Case No. 31-CA-776 admits, denies and avers as follows:

1. Respondent admits paragraphs 1. (a) and 1. (b).

2. Respondent admits paragraphs 2. (b) and 2. (a), except Respondent specifically denies it is a New York corporation. And Respondent denies allegations in paragraph 2. (c), upon information sufficient to form a belief.

3. Respondent admits paragraph 3., except Respondent denies allegations regarding Wackenhut, upon information sufficient to form a belief.

4. Respondent admits paragraph 4.

5. Respondent denies allegation of paragraph 5. (a), upon information sufficient to form a belief and Respondent denies each and every allegation in paragraph 5. (b), except Respondent admits it is now performing plant protection services for Lockheed Aircraft Service Company at Ontario, California and Respondent denies allegations of paragraph 5. (c).

6. Respondent denies each and every allegation in paragraph 6., except Respondent admits the listed persons are in Respondent's employ, except reference to Hackelhurst, Guard Captain, about whom Respondent states it has no knowledge or information.

7. Respondent denies allegations of paragraph 7.

8. Respondent denies allegations of paragraph 8, upon information sufficient to form a belief.

9. Respondent denies allegations of paragraph 9, upon information sufficient to form a belief.

10. Respondent denies allegations of paragraph 10.

11. Respondent denies the allegations of paragraph 11.

12. Respondent denies each and every allegation of paragraph 12, except Respondent specifically admits UPGWA made alleged request on Respondent on July 12, 1967.

13. Respondent denies each and every allegation of paragraph 13., except Respondent specifically admits UPGWA made alleged request on Respondent on July 12, 1967.

14. Respondent denies each and every allegation of paragraph 14, except that Respondent admits it wrote a letter on July 24, 1967 setting forth its position.

15. Respondent denies each and every allegation of paragraph 15, except that Respondent admits it

wrote a letter on July 24, 1967 setting forth its position.

16. Respondent denies allegations of paragraph 16.

17. Respondent denies allegations of paragraph 17. (a) and (b).

18. Respondent denies allegations of paragraph 18.

19. Respondent denies allegations of paragraph 19, except that part referring to Hackelhurst, Guard Captain, about whom Respondent states it has no knowledge or information, as set forth in paragraph 6. above.

20. Respondent denies allegations of paragraph 20.

21. Respondent denies each and every allegation of paragraph 21., except Respondent admits it recognized AFG on June 29, 1967 as exclusive collective-bargaining representative of Respondent's employees at Lockheed Aircraft Service Company, Ontario, California.

22. Respondent denies allegations of paragraph 22.

23. Respondent denies allegations of paragraph 23.

24. Respondent denies allegations of paragraph 24.

25. Respondent denies allegations of paragraph 25.

26. Respondent denies allegations of paragraph 26.

27. Respondent denies allegations of paragraph 27.

WHEREFORE, having fully answered, Respondent prays that an order be entered herein finding that in Case No. 31-CA-776 Respondent has at all times complied with the provisions of the Labor Management Relations Act, and that Respondent be found not to have been in violation of any of the provisions hereof as al-

leged in said Complaint, and that each and all of the complaints in said Complaint be dismissed.

/s/ J. Forrest Ingle
J. FORREST INGLE
2323 Beverly Boulevard
Los Angeles, California
For the Respondent

I certify that copies of the foregoing were mailed to International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162, 14214 East Jefferson, Detroit, Michigan, and Livingston, Gregory, Van Lopik & Cranefield, Attorneys, for Union and American Federation of Guards, Local No. 1, 4157 West Fifth Street, Room 218, Los Angeles, California, this 15th day of November 1967.

/s/ J. Forrest Ingle
For the Respondent

GENERAL COUNSEL'S EXHIBIT NO. 2

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 31

Case No. 31-CA-776

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.

and

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162

and

AMERICAN FEDERATION OF GUARDS, LOCAL 1, PARTY IN INTEREST

STIPULATION

It is hereby stipulated by Counsel for William J. Burns International Detective Agency, Inc. (hereinafter called the Respondent), and Counsel for the General Counsel of the National Labor Relations Board as follows:

1. The record in this case shall include this Stipulation and in addition the following documents attached hereto:

(a) The Plant Protection Agreement entered into May 31, 1962, between Lockheed and General Plant Protection Corp. (Wackenhut), and documents of renewals, extensions, or modifications, attached hereto as Exhibit A.

(b) The Plant Protection Agreement between Lockheed and Respondent, dated November 1, 1967, and documents of renewals, extensions, or modifications, attached hereto as Exhibit B.

2. The record in this case shall include the fact that if Mr. N. L. Benjamin, Director of Industrial Relations for Lockheed Aircraft Service Company, who is unable to attend the hearing scheduled for December 19, 1967, were to testify at the hearing, he would testify that on May 15, 1967, at a pre-bid conference attended by several guard service contractors, including the Respondent, to whom the contract was eventually let, he advised the prospective bidders that Wackenhut's guards were currently represented by United Plant Guard Workers of America; and that there was in existence a labor agreement between Wackenhut and this Union covering these employees; and that this Union had been certified by the NLRB in a recent election.

This Stipulation is made without prejudice to any objection that any party may have as to the materiality or competency of any facts stated herein.

DATED at Los Angeles, California, this 15th day of December, 1967.

Respectfully submitted,

/s/ Seymour Swerdlow
Counsel for
William J. Burns International
Detective Agency, Inc.

/s/ Gerald Goldman
GERALD GOLDMAN
Counsel for the General Counsel

/s/ Gordon A. Gregory
Counsel for Charging Party

EXHIBIT A

31 May 1967

1380-67-195

The Wackenhut Corporation
618 South Serrano Ave.
Los Angeles, Calif. 90005

Subject: Plant Protection Services

Attention: Mr. Richard G. Curtin

Gentlemen:

Thank you for your prompt response to our recent invitation to bid for the subject Plant Protection Services.

A contract award has been made to the William J. Burns International Detective Agency, Inc. The award for the aforementioned services was made upon the basis of the lowest bid price submitted.

Pursuant to paragraph 1 of Plant Protection Agreement between Lockheed Aircraft Service Company, a Division of Lockheed Aircraft Corporation, and General Plant Protection Corporation, a Division of The Wackenhut Corporation, you are herein notified that the subject agreement is terminated on the thirtieth day of June 1967.

Very truly yours,

LOCKHEED AIRCRAFT SERVICE COMPANY

/s/ P. E. Clay
P. E. CLAY, Manager
Material Department

PEC:lel

Letter Register #50766

AMENDMENT NO. 1 TO THE PLANT PROTECTION AGREEMENT

THIS AMENDMENT, made and entered into in duplicate as of the 1st day of July 1966, by and between LOCKHEED AIRCRAFT CORPORATION, for its Division, LOCKHEED AIRCRAFT SERVICE COMPANY and GENERAL PLANT PROTECTION CORPORATION.

THE PLANT PROTECTION AGREEMENT entered into by the parties as of the 31st day of May 1962, is hereby amended as follows;

1. In Article 1, delete the figure "1962" and in its place insert the figure "1966"; and delete the figure "1963" and in its place insert the figure "1967".

2. In Article 12, delete the figure "$2.18" wherever it appears and insert in its place the figure "$2.21"; and delete the figure "$3.13" wherever it appears and insert in its place the figure "$3.16".

All other terms and provisions are to remain the same.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment by their duly authorized representatives as of the date first above written.

LOCKHEED AIRCRAFT CORPORATION
for its Division,
LOCKHEED AIRCRAFT SERVICE
COMPANY

By /s/ D. O. Wood
D. O. WOOD
Its Vice President

GENERAL PLANT PROTECTION
CORPORATION

By /s/ [Illegible]
Its Manager

PLANT PROTECTION AGREEMENT

THIS AGREEMENT, made and entered into in duplicate as of the 31st day of May, 1962, by and between LOCKHEED AIRCRAFT CORPORATION, a California Corporation, for and on behalf of its Division, LOCKHEED AIRCRAFT SERVICE COMPANY, with an office and place of business at Ontario International Airport, Ontario, California (hereinafter sometimes referred to as "Lockheed") and GENERAL PLANT PROTECTION CORPORATION, a Delaware Corporation, with an office and place of business at 6900 South Hoover Street, Los Angeles, California (hereinafter sometimes referred to as "Contractor").

WITNESSETH:

WHEREAS, Lockheed as sublessee is in possession of certain land, premises, and facilities comprising a portion of the Ontario International Airport, situated in the City of Ontario, County of San Bernardino, State of California (hereinafter sometimes referred to as "the premises"); and

WHEREAS, Lockheed is utilizing the premises to carry on its business of overhaul, maintenance, and repair of aircraft; and the manufacture of certain special products and devices, and for other general business purposes; and

WHEREAS, Contractor is in the business of furnishing general plant protection services, including guard services, to industrial plants and other facilities; and

WHEREAS, it is the mutual desire of the parties hereto that Contractor shall furnish certain guard and plant protection services for the protection of Lockheed's personnel, together with certain premises and all personal property located thereon (sometimes hereinafter collectively referred to as "the personnel and property");

NOW, THEREFORE, in consideration of the premises and of the covenants and agreements hereinafter con-

tained, it is mutually agreed by the parties hereto as follows:

1. This Agreement shall commence effective the first day of July, 1962, and shall end on the thirtieth day of June, 1963, provided, however, that either party hereto shall have the right to terminate this Agreement at any time during the term hereof by giving thirty (30) days advance written notice to the other party. Lockheed shall have the right and option to extend the term of this Agreement from year to year, subject to the foregoing rights of termination, by written notice to Contractor. Any such extension shall be subject to mutual agreement of the rates hereinafter provided for by Paragraph 12 of this Agreement and any such extension which modifies the rates shall likewise be mutually executed by both parties. In the event no modification of the rates are mutually required, this Agreement may be extended by simple written notice as hereinabove provided.
2. Contractor shall furnish, over a 24-hour period per day, 7 days per week, during the term hereof, such uniformed, armed guard personnel at the premises as Lockheed shall request; their duties, posts of assignment, and hours of work to be agreed upon between the parties hereto from time to time.
3. Contractor's guard personnel shall provide proper protection to the personnel and property, including, but not limited to, protection from injury, loss or damage resulting from fire, theft, riots, strikes, sabotage, altercations and/or malicious mischief, and shall permit only authorized persons, material, and equipment to enter or leave the premises.
4. Contractor shall furnish the required adequately-trained guard personnel, completely outfitted with uniforms and necessary equipment, including badges and side arms, which said uniforms and equipment shall be of a type and meet the standards which shall be set by Lockheed and shall be maintained to Lockheed's satisfaction.

5. Nothing in this Agreement shall be construed to create the relationship of employer and employee between Lockheed and Contractor or between Lockheed and any employee or agent of Contractor, it being the intention and purpose hereof that Contractor shall at all times and for all purposes be considered as and to be an independent contractor in the performance of services hereunder. Contractor shall pay all salaries and expenses of, and shall pay all Federal Social Security taxes, Federal and State unemployment taxes, and any similar taxes relating to, said guard personnel furnished hereunder.
6. Contractor agrees that it will indemnify and hold harmless Lockheed, its officers, agents, and employees, and each of them, from any and all loss, cost, damage, expense and/or liability by reason of property damage and/or personal injury of whatsoever nature or kind, arising out of or as a result of any affirmative or negligent act or failure to act by Contractor's guard personnel in connection with the performance of services hereunder and Contractor agrees that the Public Liability and Property Damage Insurance which it is required to maintain hereunder will cover the obligations hereinabove set forth in this Article 6.
7. Contractor covenants and agrees that it will procure from insurance companies acceptable to Lockheed and maintain during the term hereof, at its cost and in its name, the following insurance:

   (a) Workmen's Compensation Insurance covering all persons employed by Contractor engaged in the performance of services hereunder;
   (b) Comprehensive Public Liability and Property Damage Insurance, including automobile liability, covering liability for bodily injuries to or death of persons or liability for damages because of injury to or loss or destruction of property, including loss of use thereof, arising out of the performance of this Agreement in the stated amounts of $100,000.00 for one person

and $300,000.00 for more than one person in any one occurrence and $300,000.00 for property damage resulting from any one occurrence. Certificates of all such insurance policies, except Workmen's Compensation Insurance, shall be filed with Lockheed and shall contain a provision that no cancellation or material change in the policies shall become effective except on ten (10) days advance written notice thereof to Lockheed.

8. In the performance of the services required to be furnished hereunder, Contractor agrees that it and its employees will comply with all statutes, ordinances, laws, rules, and regulations of all Federal and local governments and each agency, authority, or commission thereof, which may have jurisdiction to pass statutes, ordinances, or laws, or enforce rules or regulations with respect to the services furnished hereunder.
9. Without limiting the responsibility of Contractor for the proper conduct of its guard personnel and the protection of Lockheed personnel and property, the conduct of said guard personnel shall be guided by a set of standard rules as agreed upon between Lockheed and Contractor, and such special other written instructions applicable to the services as may be issued by Lockheed from time to time through its designated agents.
10. Contractor shall be responsible for the direct supervision of its guard personnel furnished hereunder through its designated supervisor assigned to the premises, and such supervisor shall, in turn, be available at all reasonable times to report to and confer with the designated agents of Lockheed with respect to the services.
11. Contractor agrees that the guard services provided hereunder shall be performed by qualified, careful, and efficient employees, in strictest conformity with the best practices and such standards as may be prescribed by Lockheed from time to time. Contrac-

tor further agrees that, upon request by Lockheed, Contractor will remove from service hereunder any of its employees who, in Lockheed's opinion, is guilty of improper conduct or is not qualified or needed to perform the work assigned to him.

12. For services rendered hereunder, Lockheed agrees to pay Contractor the sum of $2.18 for each hour worked by each of Contractor's guard personnel, including supervisors; provided, however, that in the event of a strike at said premises by Lockheed's employees, Lockheed agrees that said sum shall be increased to $3.13 during the duration of such a strike and, in addition thereto, Lockheed shall pay Contractor $1.00 for each 8-hour shift worked by each of Contractor's guard personnel during the duration of such a strike to cover the cost to Contractor for extra insurance. All unscheduled off-base hours of service ordered by Lockheed shall be billed at the premium rate of $3.13 per man-hour. Transportation and living expenses associated with off-base hours of service shall be subject to negotiation between the parties hereto at each occurrence of said off-base hours of service.
13. The supervisor provided by Contractor to supervise the guard personnel provided under this Agreement shall devote his full time to this assignment and shall not be permitted to supervise personnel or perform work at any other plant.
14. Contractor shall submit written reports as required by Lockheed, and the aforesaid supervisor, as a part of his regular duties, shall investigate any thefts or loss of property from the premises that may occur.
15. Notice to Lockheed, as herein provided, shall be served if sent by registered mail, postage prepaid, addressed to Lockheed Aircraft Service Company, a Division of Lockheed Aircraft Corporation, at Post Office Box 33, Ontario, California, and notice to Contractor in the same manner shall likewise be served if addressed to Contractor at 6900 South Hoover Street, Los Angeles, California, or at such addresses

as may be designated by Lockheed or Contractor in writing from time to time.

16. The obligations, terms, covenants, and conditions herein contained shall apply to and bind the parties hereto, and their successors and assigns.

IN WITNESS WHEREOF, the parties hereto have executed this Plant Protection Agreement as of the day and year first above written.

LOCKHEED AIRCRAFT CORPORATION

By /s/ Ralph J. Osborn
Vice President

GENERAL PLANT PROTECTION CORPORATION

By /s/ R. E. Lair
President

EXHIBIT B

PLANT PROTECTION SERVICES AGREEMENT

THIS AGREEMENT made and entered into in duplicate as of the 21st day of June, 1967, by and between LOCKHEED AIRCRAFT CORPORATION (a California Corporation), for its Division, LOCKHEED AIRCRAFT SERVICE COMPANY (hereinafter sometimes referred to as "Lockheed") having a place of business at Ontario International Airport, Ontario, California (hereinafter sometimes referred to as the "facility") and WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC. (a Delaware Corporation) (hereinafter sometimes referred to as the "Contractor") having a place of business at 2323 Beverly Boulevard, Los Angeles, California.

WITNESSETH

WHEREAS, the nature of Lockheed's business requires plant protection services for the facility and elsewhere; and

WHEREAS, the Contractor is aware of the nature and extent of such plant protection services and is willing and able to perform them;

NOW, THEREFORE, it is hereby agreed by and between the parties hereto in consideration of the covenants hereinafter set forth as follows:

1. The term of this Agreement is 1 July 1967 through 31 July 1969. Lockheed shall have the right and option to extend the term of this Agreement from year to year by written notice to the Contractor. Any such extension shall be subject to mutual agreement of the rates.
2. Contractor shall furnish over a 24-hour period per day, seven (7) days per week during the term thereof, such uniformed, armed guard personnel as Lockheed shall request. Their duties, posts of assignment, and hours of work are to be agreed upon between the Contractor and Lockheed. Contractor

shall provide immediate and uninterrupted maintenance of plant protection services in the event of a strike or walkout by the Contractor's employees on duty at the Lockheed facility.

3. Contractor's guard personnel shall provide proper protection to all Lockheed personnel and property, including, but not limited to, protection from injury, loss or damage resulting from fire, theft, riots, strikes, sabotage, altercations and/or mischief, and shall permit only authorized persons, material and equipment to enter and leave the facility. Said services will be provided in compliance with Lockheed and pertinent Government rules and regulations.
4. Contractor will furnish the required adequately trained guard personnel, completely outfitted with uniforms and necessary equipment, including badges, passes and side arms. Uniforms and equipment must meet the standards set by Lockheed and shall be maintained to Lockheed's satisfaction.
5. Nothing in this Agreement shall be construed to create the relationship of employer and employee between Lockheed and Contractor or between Lockheed and any employee or agent of Contractor, it being the intent and purpose hereof that Contractor shall at all times and for all purposes be considered an independent Contractor in the performance of services hereunder. Contractor shall pay all salaries and expenses of, and shall pay all Federal Social Security Taxes, Federal and State Unemployment Taxes, and any similar taxes relating to said guard personnel furnished hereunder.
6. Contractor agrees that it will indemnify and hold harmless Lockheed, its officers, agents and employees, and each of them from any and all loss, cost, damage, expense and/or liability by reason of property damage and/or personal injury of whatsoever nature or kind, arising out of or as a result of any affirmative or negligent act or failure to act by Contractor's guard personnel in connection with the performance of services hereunder and Contractor agrees that the Public Liability and Property Dam-

age Insurance which it is required to maintain hereunder will cover the obligations herein above set forth in the paragraph.

7. Contractor covenants and agrees that it will procure from insurance companies acceptable to Lockheed and maintain during the term hereof at its cost and in its name the following insurance:

   A. Workmen's Compensation Insurance covering all persons employed by Contractor engaged in the performance of services hereunder;

   B. Comprehensive Public Liability and Property Damage Insurance, including automobile liability, covering liability for bodily injuries to or death of persons or liability for damages because of injury to or loss or destruction of property, including loss of use thereof, arising out of the performance of this Agreement in the stated amounts of $100,000 for one person, and $300,000 for more than one person in any one occurrence, and $300,000 for property damage resulting from any one occurrence.

   C. Certificates of all such insurance policies, except Workmen's Compensation Insurance, shall be filed with Lockheed and shall contain a provision that no cancellations or material change in the policies shall become effective except on ten (10) days' advance written notice thereof to Lockheed.

8. In the performance of the services required to be furnished hereunder, Contractor agrees that it and its employees will comply with all statutes, ordinances, laws, rules and regulations of all Federal, State and Local Governments and each agency, authority or commission thereof, which may have jurisdiction to pass statutes, ordinances or laws or enforced rules or regulations with respect to services furnished hereunder.

9. Without limiting the responsibility of Contractor for the proper conduct of its guard personnel and the protection of Lockheed personnel and property, the

conduct of said guard personnel shall be guided by a set of standard rules as agreed upon between Lockheed and Contractor, and such special other written instructions applicable to the services as may be issued by Lockheed from time to time through its designated agents.

10. Contractor shall be responsible for the direct supervision of its guard personnel furnished hereunder through its designated supervisor assigned to the facility, and such supervisor shall, in turn, be available at all reasonable times to report to and confer with the designated agents of Lockheed with respect to the services.
11. Contractor agrees that the guard services provided hereunder shall be performed by qualified, careful and efficient employees, in strictest conformity with the best practices and such standards as may be prescribed by Lockheed from time to time, and shall possess necessary security clearances, as required by Department of Defense Industrial Security Regulations. Contractor further agrees that, upon request by Lockheed, Contractor will remove from service hereunder any of its employees who, in Lockheed's opinion, is guilty of improper conduct or is not qualified or needed to perform the work assigned to him. Contractor possesses or shall take immediate steps to obtain a "Top Secret" facility clearance. Said "Top Secret" clearance terminology is as defined in the Department of Defense Industrial Security Regulations.
12. The supervisor provided by Contractor to supervise the guard personnel provided under this Agreement shall devote his full time to this assignment and shall not be permitted to supervise personnel or perform work at any other plant.
13. The Contractor shall submit written reports as required by Lockheed, and the aforesaid supervisor, as a part of his regular duties, shall investigate any thefts or loss of property from the facility that may occur.

14. For services rendered hereunder, Lockheed agrees to pay Contractor the sum of $2.55 for each hour worked by each of Contractor's guard personnel, including supervisors. In the event of a strike at said premises by Lockheed's employees, the rate for each hour worked shall also be $2.55. All unscheduled off-base hours or service ordered by Lockheed shall be billed at the rate of $2.55 per manhour. Transportation and living expenses associated with off-base hours of service shall be subject to negotiation between the parties hereto at each occurrence of said off-base hours of service.
15. Invoices will be prepared by the Contractor on a monthly basis and must be accompanied by or referenced to time records that show the hours expended by each guard and the hourly billing rate.
16. Contractor shall furnish additional equipped guards to accomplish protective requirements which may be requested by Lockheed. Such service shall be provided by the Contractor at standard-time billing rates.
17. In connection with the performance of work under this Agreement, the Contractor agrees not to discriminate against any employee for employment, because of race, religion, color, sex, or national origin. This provision shall include, but not be limited, to the following: employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.
18. The services to be performed hereunder shall be in accordance with the Statement of Work dated 12 May 1967, which is attached hereto and by reference made a part hereof.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by their duly authorized representatives as of the date first above written.

LOCKHEED AIRCRAFT CORPORATION
For its Division
LOCKHEED AIRCRAFT SERVICE
COMPANY

By /s/ D. O. Wood
D. O. WOOD
Its President

WILLIAM J. BURNS INTERNATIONAL
DETECTIVE AGENCY, INC.

By /s/ [Illegible]

Its Branch Manager

/s/ [Illegible]

Date: 12 May 1967

STATEMENT OF WORK

1. Contractor shall provide sufficient guards to control entry and exits of employees through perimeter complex entrances, identified on the enclosed facility diagram. Guards shall be assigned to such posts on the following schedule, or as circumstances may dictate, by Lockheed.

   a. *Mian Guard Station: Gate #201, Area 01*

      (1) One patrolman, 24 hours per day, 7 days per week

      (2) One Sergeant, 24 hours per day, 7 days per week

      (3) One Captain (Supervisor), 8 hours per day, 5 days per week

      (4) One Patrolman (relief), 16 hours per day, 5 days per week

      (5) One Patrolman (roving), 24 hours per day, 7 days per week

   b. *Lobby, Building #10, General Offices*

      (1) One Patrolman, 10.5 hours per day, 5 days per week

   c. *East Gate, Station #203, Area 01*

      (1) One Patrolman, 19.5 hours per day, 5 days per week

   d. *Gate #213, Area 04*

      (1) One Patrolman, 24 hours per day, 7 days per week

2. Contractor shall provide or supply the following property or equipment during the term of the Agreement:

   a. *Vehicles*

      (1) Supply a minimum of two (2) vehicles to be used by assigned guard personnel during the period July 1967 through June 1968.

(2) Supply a minimum of two (2) vehicles to be used by assigned guard personnel during the period June 1968 through July 1969. Vehicles to be equipped with a telephone communications system for control and dispatch purposes.

b. *Clothing*

(1) Provide all guards with uniforms and accessory items, including headgear.

(2) Supply inclement weather clothing, such as raincoats, hats, boots or cold weather jackets for guard personnel whose duties will require exposure to climatic elements.

c. *Equipment*

(1) Supply night sticks to all guards performing duty at facility entry points reflected in paragraph 1.

(2) Supply guards performing roving patrol functions with shoulder-strapped carrying pouches to carry detex punch clocks, locks, flashlights, clipboards, and similar hardware which may be required.

(3) Supply each guard assigned to duty during hours of darkness with a two or three cell flashlight, equipped with necessary batteries for operation.

(4) Provide guards assigned to designated "restricted" or "closed" areas with firearms and associated belts, holsters and ammunition.

(5) Provide a reserve supply of equipment for issue to guard personnel during an emergency environment to consist of the following:

(a) First aid kits, equipped with sterilized dressings, gauze, bandage, tape and customary medicants provided in universally manufactured, commercial-type first aid kits.

(b) Handcarried, battery-operated, flash lamps, with a beam-illumination of not

less than 150 feet, including necessary batteries. A minimum of six (6) units will be maitnained in a state of readiness at the Guard Control Headquarters (Main Gate).

(c) As needed and predicated upon specific request of Lockheed, riot equipment such as protective helmets, riot weapons (shot guns) and ammunition, chemical ampules or gas or smoke (non-poisonous).

(6) Such expendable supplies required to administer plant protection activity; such as necessary report forms, papers and similar items.

3. Lockheed shall furnish or supply:

a. Guard houses/huts as required at non-mobile guard posts.
b. Telephone service.
c. Necessary electrical power and water supply as deemed necessary by Lockheed.
d. Peculiar forms, credentials, or medical supplies, necessary in completing tasks by guard personnel, including the National flag(s).

4. The Contractor shall maintain the guard houses and posts in an orderly and clean condition.
5. Contractor shall accomplish a roving foot patrol of all administrative areas situated in complex 01 once each 2 hours, over a 24-hour interval, 7 days per week.
6. Contractor shall provide a reserve force of patrolman to man selected stations in area 01, 24 hours per day, 7 days per week, as operational circumstances require. Call stations involving 7 guard posts.

TASK

1. Guard personnel shall:

a. Raise and lower the National flag at times prescribed by Lockheed in areas 01, 04 and such other places as may be prescribed.

b. During non-working hours (4:45 p.m. to 8:00 a.m., Mondays through Fridays, and all hours, Saturdays, Sundays and holidays) answer all incoming telephone calls, place telephone calls for employees working in the facility and operate the in-plant address system.
c. Receive, record all employee reports of absence and dispose of such reports in accordance with directions furnished by Lockheed.
d. Provide emergency condition notifications to designated Lockheed representatives according to direction of Lockheed.
e. Perform:
    (1) Fire and safety inspections during routine patrols.
    (2) Physical security inspections of perimeter fences; designated "CLOSED" areas and examinations of safes, files and other containers.
    (3) Enforce parking allocations, notify violators of parking requirements.
    (4) Maintain:
        (a) A record of all inspections, incidents as a matter of routine.
        (b) Controlled entry lists authorizing the admittance of company employees into specific areas.
        (c) Records involving visitors, vendors and other suppliers.
f. Perform vehicle inspections to determine entry and exit of property.
g. Perform inspections of employees' property for determination of authorized removal from the facility.
h. Render first aid as required and dispense first aid supplies as needed.
i. Destroy classified data in accordance with schedules and procedures prescribed by Lockheed.

GENERAL COUNSEL'S EXHIBIT No. 3

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 31

Case No. 31-CA-776

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.

and

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162

and

AMERICAN FEDERATION OF GUARDS, LOCAL 1,
PARTY IN INTEREST

STIPULATION

It is hereby stipulated by Counsel for William J. Burns International Detective Agency, Inc. (hereinafter called the Respondent), and Counsel for the General Counsel of the National Labor Relations Board as follows:

1. The Wackenhut Corporation prior to July 1, 1967, performed plant protection services for Lockheed Aircraft Service Company, Ontario International Airport, Ontario, California.

2. Since on or about July 1, 1967, Wackenhut Corporation has ceased to perform plant protection services for Lockheed Aircraft Service Company, Ontario International Airport, Ontario, California.

3. Since on or about July 1, 1967, Respondent has performed plant protection services for Lockheed Aircraft Service Company, Ontario International Airport, Ontario, California.

4. On or about February 28, 1967, a majority of the employees of Wackenhut, in a unit consisting of all full-time and regular part-time employees of Wackenhut performing plant protection duties as determined in Section 9(b)(3) of the Act, at the Lockheed Aircraft Service Company, Ontario International Airport, Ontario, California; excluding office clerical employees, professional employees, supervisors and all other employees as defined in the Act, by a secret ballot election conducted under the supervision of the Regional Director for the Thirty-first Region of the National Labor Relations Board, voted as indicated on the tally of ballots, attached hereto as Exhibit No. 1, and on or about March 8, 1967, said Regional Director certified the United Plant Guard Workers of America as the exclusive collective-bargaining representative of the employees in said unit. A copy of said Certification of Representative is attached hereto as Exhibit No. 2.

5. On or about April 29, 1967, Wackenhut and the United Plant Guard Workers of America entered into a collective-bargaining agreement, a copy of which is attached hereto as Exhibit No. 3.

6. The attached letter, marked Exhibit No. 4, is the alleged request referred to in paragraphs 12 and 13 of the Amended Answer of Respondent and the record in this case shall include said letter.

7. The attached letter, marked Exhibit No. 5, is the letter referred to in paragraphs 14 and 15 of the Amended Answer of Respondent and the record in this case shall include said letter.

8. On July 1, 1967, when Respondent officially began guard service, some twenty-seven (27) guards formerly working at Lockheed Aircraft Service Company, Ontario International Airport, Ontario, California, in the employ of the Wackenhut Corporation began working as guard employees of Burns; and, concurrently, fifteen (15) employees of Burns, who were transferred from other Burns jobs, also began working at Lockheed. At present Respondent employs twenty-one (21) former Wackenhut employees, twenty-three (23) Burns employees who were

transferred from their Burns jobs, and eight (8) new hires.

This Stipulation is made without prejudice to any objection that any party may have as to the materiality of competency of any facts stated herein.

DATED at Los Angeles, California, this 18th day of December 1967.

Respectfully submitted,

/s/ Seymour Swerdlow
Counsel for
William J. Burns International
Detective Agency, Inc.

/s/ Gerald Goldman
GERALD GOLDMAN
Counsel for the General Counsel
National Labor Relations Board

/s/ Gordon A. Gregory
Counsel for Charging Party

EXHIBIT 3

AGREEMENT

BETWEEN

THE WACKENHUT CORPORATION

and

INTERNATIONAL UNION,

UNITED PLANT GUARD WORKERS OF AMERICA

AND ITS

AMALGAMATED LOCAL 162

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Appendix "A"

PREAMBLE OF THE AGREEMENT

This Agreement is entered into this, the 29th day of April, 1967, by and between The Wackenhut Corporation in Ontario, California, hereinafter referred to as the "Company" and the International Union, United Plant Guard Workers of America and its Amalgamated Local No. 162, hereinafter referred to as the "Union".

ARTICLE 1

Intent and Purpose of the Agreement

1.1 It is the intent and purpose of this Agreement to assure sound and mutually beneficial industrial and economic relationships between the parties hereto, to provide an orderly and peaceful means of conducting negotiations and resolving any misunderstanding or grievances, and to set forth herein the basic agreement between the parties covering rates of pay, wages, hours of work and other conditions of employment.

1.2 The Union, the Company and all employees are bound by and hereby pledge their cooperation in observing all provisions of this Agreement.

1.3 This Agreement shall be binding upon the parties hereto, their successors and assigns and no provisions, terms or obligations herein contained shall be affected, modified, altered, or changed in any respect whatsoever by the consolidation, merger, sale, transfer, or assignment of either party hereto, or affected, modified, altered or changed in any respect whatsoever by any change of any kind in the legal status, ownership or management of either party hereto.

ARTICLE 2

Recognition and Scope of the Agreement

2.1 The Company recognizes the Union and its amalgamated Local 162 as the exclusive collective bargaining representative for all employees designated by the Na-

tional Labor Relations Board's Certification of Representative issued on March 8, 1967, in NLRB case number 31-RC-455, including all full-time and regular part-time employees of the Employer performing plant protection duties as determined in Section 9(b)(3) of the Act at the Lockheed Aircraft Service Company, Ontario International Airport; excluding office clerical employees, professional employees, supervisors, and all other employees as defined in the Act.

ARTICLE 3

Equal Employment Opportunity

3.1 The Company and the Union recognize the responsibility as anticipated in the program of the President's Committee on Equal Employment Opportunity and their responsibility under Federal, State and local laws relating to fair employment practices.

3.2 The Company and the Union further recognize the moral principles involved in the area of civil rights and hereby affirm their commitment not to discriminate because of sex, color, race, creed or national origin.

ARTICLE 4

Continuity of Operations

4.1 During the term of this Agreement there shall be no strikes, lockouts, work stoppages, picket lines, slowdowns or secondary boycotts. The Union guarantees to support the Company fully and maintain operations in every way.

4.2 In the event of any work stoppage by another labor group involving the client's property or operations, the employees will continue to man stations for the protection of life and property, fire watch, and protection of security interests on the premises.

4.3 Guards will not be required to participate in any strike breaking activities.

ARTICLE 5

SECURITY

5.1 The Union recognizes that the Company has certain obligations in its contract with its client pertaining to security and agrees that nothing in this Agreement is intended to place the Company in violation of its security agreement with its client. Therefore, in the event any governmental agency advises the Company that any employee covered by this Agreement is restricted from work on, or access to, classified information or material, neither the employee nor the Union will contest the discharge of such employee by the Company. The Union will be notified of a discharge under this Section.

ARTICLE 6

ADJUSTMENT OF GRIEVANCES

6.0 In order to establish effective machinery for a fair, expeditious, and orderly adjustment of grievances, the parties agree that in the event any complaint or grievance arises over the interpretation or application of any provisions of this contract, there will be an earnest effort to settle such complaint or grievance by the following procedure:

6.1 Step 1. An employee who believes he has justifiable complaint or grievance shall discuss such with his supervisor, in an attempt to settle the grievance or complaint. A union steward may be present at such presentation or may present the grievance on behalf of the union or the employee.

6.2 Step 2. If the matter is not resolved in Step 1, the grievance shall, not later than ten (10) calendar days after the occurrence of the facts giving rise to the grievance, be reduced to writing, setting forth the facts in detail, and specifying the Article and Section allegedly violated, and signed by the aggrieved employee and the Committeeman, and shall be submitted to the officer in charge of that operation or his designee. The officer in

charge of the operation or his designee will have ten (10) calendar days from the date the grievance was presented to him to answer in writing, with copy to the aggrieved employee and the Committeeman.

6.3 Step 3. If the matter is not resolved in Step 2 it will be reviewed by the local union president and the Company's West Coast Personnel Supervisor within five (5) calendar days of the denial by the officer in charge of the operation. The Personnel Supervisor will have five (5) calendar days from the date of the review to submit his answer.

6.4 If the grievance is still unsettled, it will be reviewed by the International Union representative and the Company's Vice-President of Industrial Relations, or their designees within ten (10) days, excluding Saturdays, Sundays, and Holidays, of the denial by the Company's West Coast Supervisor.

6.5 Grievances which have been processed in accordance with the requirements of the aforesaid Paragraphs and which remain unsettled may be processed to arbitration in accordance with the following procedures and limitations:

6.6 The Union, within ten (10) calendar days after the rejection of the grievance by the Vice-President of Industrial Relations or his designee, may in writing notify the Company of its intent to invoke arbitration, and the Company and the Union will jointly attempt to agree upon the selection of a neutral arbitrator to hear the case. Should the parties fail to agree upon the selection of an arbitrator, the party seeking arbitration will request the Federal Mediation and Conciliation Service to supply a list of arbitrators to hear the case; copy of this request will be sent to the other party. This request will be made within five (5) calendar days after failure of the parties to agree upon an arbitrator. An arbitrator will be selected from the list supplied by the Federal Mediation and Conciliation Service by the parties alternately striking from the list until one name remains, and this individual will be the arbitrator to hear the case.

6.7 The decision of the arbitrator shall be final and binding on all parties concerned. Cost of arbitration shall be borne equally by the Union and the Company. Arbitrators cannot change, modify or amend this Agreement, but only interpret and apply it.

6.8 Any grievance involving discharge, layoff or other potential accumulating back pay liability shall be commenced at Step 2 of this procedure and the written grievance shall be prosented to the officer in charge of the operation or, in his absence, to his designee within five (5) calendar days after the occurrance of the facts giving rise to the grievance.

6.9 All time limits contained in this Agreement may be extended by mutual agreement between the Union and the Company.

ARTICLE 7

Management Rights

7.1 The management of the Company and the direction of its employees, including the establishment of reasonable work rules and regulations, the hiring, promoting, demoting and rehiring of employees in connection with any reduction or increase in working forces, the suspending, the discharging or otherwise disciplining of employees are the exclusive functions of the Company, to the extent that any of such matters are not otherwise covered or provided for in this Agreement.

7.2 Any claim that the Company has exercised such right and power contrary to the provisions of this Agreement may be taken to the Grievance-Arbitration provision contained in Article 6.

ARTICLE 8

Discipline and Discharge

8.1 The Company has the right to discipline or discharge an employee for incompetency, disobedience, disorderly conduct, negligence, or any other just and sufficient cause.

8.2 Written notice (two copies) of disciplinary action will be furnished the affected employee.

8.3 Upon taking of discharge action against an employee, the Company will permit the employee to contact his Union representative, if he so desires, before leaving the premises.

8.4 Any employee interviewed concerning the discipline may, if he so desires, request the presence of his Union representative to represent him during such interview.

8.5 During his probationary period, an employee may be discharged or disciplined at the Company's option without recourse to the grievance procedure, except for any alleged discrimination because of lawful and legitimate activity on the part of the employee in or on behalf of the Union not in conflict with this Agreement.

8.6 In imposing any discipline on a current charge, management will not take into account any prior infractions which occurred more than two (2) years previously.

ARTICLE 9

Notice of Termination of Employment

9.1 Employees shall give the Company two (2) weeks' notice of resignation in writing. Failure to give such notice shall result in the forfeiture of the employee's accrued vacation.

9.2 Employees laid off through no fault of their own shall be granted two (2) weeks' notice in writing, or two (2) weeks' pay in lieu thereof, except in the event the Company's contract with its prime contractor is terminated.

9.3 The requirement of notice set forth in the above paragraph shall not apply to a layoff caused by an Act of God, strike, or other similar circumstances beyond the control of the Company.

ARTICLE 10

CASUALS

10.1 The Union and the Company agree that the employment of "casuals" will be for the purpose of covering absenteeism among the work force at Ontario. The number of employees that may be utilized as "casuals" at any one time will not exceed three (3) employees during the life of this Agreement.

10.2 Casuals will earn seniority among themselves while so classified, and should a casual refuse a transfer to regular status when offered, his name will drop to the bottom of the casuals' seniority list.

10.3 When casuals accept a transfer to regular status, they will carry with them all accumulaed and/or earned credits for pay and benefit eligibility purposes from their original date of hire.

10.4 Casuals, when transferring to regular status, will not carry with such transfer more than the first ninety (90) calendar days or sixty (60) actual days worked, whichever is greater, for seniority purposes.

ARTICLE 11

UNION SECURITY

11.1 It is a continuing condition of employment with the Company that all employees covered by this Agreement shall join and remain in good standing with the Union. Persons losing their membership in the Union shall not be retained in the employ of the Company. It is agreed that the Company will not be required to discharge an employee in any instance where it would result in a violation of the Labor-Management Relations Act of 1947. Employees will not be required to join the Union until thirty (30) days after hired.

ARTICLE 12

UNION REPRESENTATION

12.1 The Company agrees to recognize a Chairman of the Local Union Committee and three (3) Committeemen

from the bargaining unit herein, which includes one (1) Committeeman for each shift and one (1) alternate Committeeman for each shift to serve as Committeeman in the absence of the regular Committeeman.

12.2 The Chairman of the Local Union Committee or his designated representative may sit in on grievance meetings.

12.3 Committeemen will not suffer any loss of time during working hours while processing or investigating any grievance.

12.4 The Company shall provide bulletin boards for the use of the Union. All notices placed on such bulletin boards shall relate solely to official Union business and shall bear the official seal of the Union. A copy of all notices to be posted on the bulletin boards shall be approved by the Company prior to posting.

12.5 No employee or Committeeman shall leave his post unless properly relieved in order to present or discuss any grievance. The officer in charge of the shift or his designee will release the Committeeman when requested for this purpose, unless he cannot be released due to an emergency situation.

ARTICLE 13

Assignment and Authorization for Check-Off of Union Dues

13.1 The Company shall, for the term of this Agreement, deduct Union dues, initiation fees and assessments uniformly levied in accordance with the Constitution and By-Laws of the Union from the first paycheck of each month of members who authorize such deduction in writing, and shall pay the same to the Secretary-Treasurer of the Union on or before the first day of the following month.

13.2 The check-off authorization to be executed and furnished to the Company by the Union and the employees shall be in the following form:

AUTHORIZATION FOR CHECK-OFF OF DUES

S.S. No. _____

To _____

Division _____

Hereinafter referred to as the Company.

Date _____

"I hereby assign to Local Union No. _____, International Union, United Plant Guard Workers of America, U.P.G.W.A., hereinafter referred to as the Union, from any wages earned or to be earned by me as your employee, the sum of $5.00 per month and initiation fees and assessments, or such amount as may hereafter be established by the Union and become due to it, as my membership dues in said Union, I authorize and direct you to deduct such amounts from my _____ each month and to remit the same to the Union.

"The assignment, authorization and direction shall become effective upon delivery, subject to the check-off provisions of the _____ Year _____ Agreement of the _____ and Local No. _____, United Plant Guard Workers of America.

"This assignment, authorization and direction shall be irrevocable for the period of one (1) year, or until the termination of the said new collective agreement between the Company and the Union, whichever occurs sooner, and I agree and direct that this assignment, authorization and direction shall be automatically renewed, and shall be irrevocable for successive periods of one (1) year each or for the period of each succeeding applicable collective agreement between the Company and the Union, whichever shall be shorter, unless written notice is given by me to the Company and the Union not more than twenty (20) days and not less than ten (10) days prior to the expiration of each period of one (1) year, or of each applicable collective agreement be-

tween the Company and the Union, whichever occurs sooner.

"This authorization is made pursuant to the provisions of Section 302(c) of the Labor Management Relations Act of 1947 and otherwise.

_____

(Signature of Employee here)

_____

(Address of Employee)

_____

(Type or print name of Employee here)

_____

(Employee's Clock No.)"

13.3 The Union accepts full responsibility for the authenticity of each Check-Off Authorization submitted to the Company, and any authorizations which are incomplete or in error shall be disregarded by the Company; authorizations which are incomplete or in error shall be returned to the Union immediately for correction. The Union agrees that upon receipt of proper proof, it will refund to the Company any deduction erroneously or illegally withheld from an employee's earnings by the Company which have been transmitted by the Company to the Union. The Union further agrees to indemnify the Company and hold it harmless against any and all claims, suits or other forms of liability which may be made against it by any party for amounts deducted from wages as herein provided.

13.4 No deductions of Union dues will be made from the wages of any employee who has executed a Check-Off form and who has been transferred to a job not covered by the Agreement, or who is not in pay status. Upon return to work within a classification covered by this Agreement, deductions from future wages shall be automatically resumed provided the employee has not revoked the assignment in accordance with this Agreement, and provided it is in accordance with other appropriate provi-

sions of this Agreement and of the National Labor Relations Act, as amended.

13.5 An employee who has executed a Check-Off form and who resigns or otherwise is terminated from the employ of the Company shall be deemed to have automatically revoked his assignment and if he is recalled or re-employed, further deductions of Union dues will be made only upon execution and receipt of a new Check-Off form.

13.6 Collection of any back dues owed at the time of starting deductions for any employee and collection of dues missed because the employee's earnings were not sufficient to cover the payment of dues for a particular pay period will be the responsibility of the Union and will not be subject of payroll deductions.

13.7 Deduction of membership dues shall be made in a flat sum provided that there is a balance in the paycheck sufficient to cover the amount after all other deductions authorized by the employee or required by law have been satisfied. In the event of termination of employment, the obligation of the Company to collect dues shall not extend beyond the pay period in which the employee's last day of work occurs.

ARTICLE 14

SENIORITY

14.1 During the first ninety (90) calendar days or sixty (60) actual days worked, whichever period is the greater, an employee shall be regarded as a probationary employee and shall have no seniority or seniority rights whatsoever.

14.2 Seniority under this Agreement shall commence with the date of employment of the individual in the bargaining unit herein.

14.3 Layoffs and recalls therefrom shall be effected on a seniority basis to the extent that employees are qualified to fill available assignments.

14.4 A seniority list, giving name and date of employment of all personnel covered under this Agreement, shall be furnished to the Union at the time of the execution of this Agreement. A list of additions and separations will be furnished to the Union monthly.

14.5 A laid-off employee shall have call-back rights for a period of one (1) year, or for the length of his or her seniority, not to exceed three (3) years, providing the employee continues to be qualified for employment. It is the responsibility of the laid-off employee to keep the Company advised by certified mail of any changes in his or her mailing address. The Company shall be considered to have fulfilled its obligation for recall under this Section by sending notice of the job opening to the employee's last-known address by certified mail. The position will not be filled on a permanent basis until after the expiration of five (5) working days after notice is given in accordance with this Section.

14.6 An employee who is discharged for cause, voluntarily resigns, or transfers out of the bargaining unit, except as provided in Paragraph 14.7 below, shall lose all seniority rights.

14.7 Any employee who accepts a supervisory position with the Company at its operation in Ontario, shall retain the seniority he had as of the date of promotion to a supervisor, but shall not accumulate additional seniority while employed in a supervisory capacity. If he later returns to the bargaining unit, he will return to a job to which his seniority entitles him. If he does not return within six (6) months, he shall lose his seniority.

14.8 Notwithstanding their position on the seniority list, the following Union representatives, in the event of layoff, shall be continued at work as long as there is sufficient work under this Agreement on the installation at which they are employed. Chairman of the Local Union, if he is within the bargaining unit, and not to exceed a total of three (3) committeemen.

14.9 Seniority shall govern choice of shift assignments and days off, a choice to be made once each twelve (12)

months. Assignments to be worked out between the Local Union Committee and the Company representative.

14.10 The Chairman of the Local Union Committee shall have his choice of shift each twelve (12) months and may, if he so requests, be scheduled on a Monday-through-Friday Schedule.

14.11 When promotions are necessary within the bargaining unit, placements will be made in accordance with seniority provided the employee has the ability and is qualified to perform the work.

14.12 Employees shall be regarded as part-time employees until they request and are assigned to work on a permanent forty-hour workweek.

14.13 In the case of layoffs the following order will be followed in the layoff: (1) probationary (2) part-timers (3) full time employees.

14.14 Separate seniority lists for both full and part-time employees giving name and date of employment of all personnel covered under this Agreement, shall be furnished to the Union upon execution of this Agreement. A list of additions and separations will be furnished to the Union monthly.

ARTICLE 15

Hours of Work

15.1 The normal workweek shall commence at 2200 hours Friday and end one-hundred sixty-eight (168) hours thereafter. A regular weekly work schedule shall consist of five (5) work days of eight (8) hours each.

15.2 The normal work day shall commence at the employee's shift starting time and extend for a period of twenty-four (24) hours.

15.3 Each employee shall be scheduled so as normally to be off two (2) consecutive days in the workweek.

15.4 Changes in hours of work or assignments to shifts may be made whenever necessary. Except in cases of

emergency or where insufficient prior notice is received from the client, five (5) days' notice shall be given in advance of all such changes. The Chairman of the Local Committee or his designee will be informed of all such changes.

15.5 All time worked in a continuous tour of duty, including overtime, shall be considered as work performed on the day within which the tour of duty is started.

15.6 Any employee scheduled by the Company to report for work on a day on which a hurricane occurs or is forecast shall receive a minimum of four (4) hours' pay if he reports for work; radio notification not to report given at least two (2) hours prior to the regular starting time of their shift shall be presumed conclusively to have been received by all employees to whom such notification is directed and any employee affected by such notice who thereafter reports shall not be entitled to pay therefor.

15.7 If work of a higher classification is required of an employee for one (1) hour or more, he shall receive the rate of pay of the higher classification for time worked in such classification. If work of a lower classification is required of an employee, his rate of pay shall not be reduced.

15.8 Time worked shall be computed to the nearest one-tenth (1/10th) of an hour.

15.9 The Company will establish three (3) main eight-hour shifts, beginning between 5:00 A.M. and 7:00 A.M., 1:00 P.M. and 3:00 P.M., and 9:00 P.M. and 11:00 P.M. Necessary special shifts may be established.

15.10 An employee assigned to a shift which begins at or after 12:00 noon, but before 5:00 P.M., shall receive a shift differential of five cents per hour. An employee assigned to a shift which begins at or after 5:00 P.M., but before 5:00 A.M., shall receive a shift differential of ten cents per hour. No shift differential shall be received by an employee assigned to a shift which begins at or after 6:00 A.M. but before 12:00 noon.

15.11 An employee may be required to rotate shifts during a workweek, in which event he shall receive for all shifts worked ten cents per hour shift differential.

15.12 The scheduling practice existing at the time of signing of this Agreement will be maintained, unless operational or personnel requirements necessitate a change, in which event the local Union representatives shall have the right to confer with management.

ARTICLE 16

Overtime Compensation

16.1 No overtime work shall be required or permitted except by direction of the proper supervisory personnel of the Company, except in cases of emergency where prior authority cannot be obtained.

16.2 Employees hereunder shall not be required to suspend work in regular hours to obsorb overtime.

16.3 Security requirements permitting, overtime work shall be distributed equitably among the employees who normally perform the work necessitating overtime.

16.4 There shall be no pyramiding of overtime and no employee shall receive more than double the straight-time rate for any hours worked.

16.5 Time paid for, but not worked due to illness, shall be considered as time worked for the purpose of computing overtime.

16.6 Any employee who reports for work as scheduled shall, unless previously advised not to report, receive a minimum of four (4) hours' work or four (4) hours' pay therefor.

16.7 An employee whose overtime working period continues into the following day shall continue to receive overtime rates for all overtime so worked. If such overtime work period shall continue so that its termination shall fall within seven and one-half (7-1/2) hours prior to his resumption of work in the succeeding work day,

he shall receive overtime rates for all time so worked during his next regular tour of duty.

16.8 Time worked in excess of eight (8) hours on any work day shall be considered overtime and shall be paid at the rate of time and one-half.

16.9 Time and one-half the regular hourly rate shall be paid for all work done at Company request on the sixth (6th) day worked in an employee's workweek.

16.10 Double the regular hourly rate shall be paid for all work done at Company request (a) on the seventh (7th) day worked in the workweek, (b) in excess of twelve (12) hours in any work day, (c) in excess of eight (8) hours on the sixth (6th) day worked in the workweek, and (d) on the seventh (7th) consecutive day worked, irrespective of whether it is the same workweek.

16.11 Premium pay for hours worked as described herein shall not be paid when such hours result from a regular shift change, or when an individual's shift is changed at his request (which request must be approved by the appropriate supervisor), any provisions herein to the contrary notwithstanding. However, any continuous work in excess of eight (8) hours on any tour of duty shall be paid for at the applicable overtime rate.

16.12 Time and one-half the employee's regular straight-time hourly rate, with a minimum of two (2) hours, shall be paid to an employee called in to work prior to his scheduled starting time, for work performed prior to such scheduled starting time. Time and one-half the employee's regular straight-time rate, with a minimum of one (1) hour, shall be paid to an employee required to work beyond his normal quitting time.

ARTICLE 17

General Wage Provisions

17.1 Effective April 29, 1967, all employees on the payroll as of that date will receive a ten cent (10¢) an hour increase in their base wage rate.

17.2 Effective April 29, 1967, bargaining unit sergeants will receive a twenty-five cent (25¢) an hour increase.

17.3 The following rates of pay will be effective on June 24, 1967, and thereafter for these employees on the payroll on the dates indicated:

GUARDS	6/24/67	4/26/68	4/26/69
Start	1.60	1.70	1.80
After 3 months of service	1.65	1.75	1.85
After 9 months of service	1.70	1.80	1.90
After 15 months of service	1.75	1.85	1.95

17.4 In the event an employee is promoted to the classification of sergeant, he will receive twenty-five cents (25¢) an hour above the highest rate of pay in effect at the time.

ARTICLE 18

HOLIDAYS

18.1 During the first year of this Agreement, all eligible full-time employees will be paid straight-time pay for eight (8) hours for each of the following holidays on which they are not required to work:

New Years Day
Memorial Day (May 30)
Independence Day
Labor Day
Thanksgiving Day
Christmas Day

18.2 An eligible full-time employee required to work on any of the above holidays shall receive double his regular rate of pay as full compensation for such holiday worked.

18.3 Time paid for but not worked on a holiday shall be considered as time worked for the purpose of computing overtime.

18.4 An employee eligible to receive holiday pay who is scheduled to work on a holiday and who, after being assigned, refuses or fails to report for work without reasonable cause, shall not receive holiday pay.

18.5 In order to be eligible for holiday pay, a full-time employee must have been on pay status during the work-week in which the holiday falls and must have worked his last scheduled work day prior to and his next scheduled work day after such holiday, unless his absence is excused by the Company.

18.6 In the event a holiday falls during that time an employee is on accrued Sick Leave, the employee will receive holiday pay at the regular straight-time rate for the holiday, the day off not being charged to his accrued Sick Leave.

ARTICLE 19

VACATIONS

19.1 Full time employees continuously employed for one (1) year shall receive one (1) week's vacation with pay based on forty (40) hours per week at straight time.

19.2 Full time employees continuously employed for more than five (5) years shall receive two (2) weeks' vacation with pay based on forty (40) hours' work per week at straight time.

19.3 A full time employee who has completed one (1) year of service shall be paid for his accrued vacation upon termination of employment, subject to the provisions of Paragraph 4, below.

19.4 An employee who resigns without giving two (2) weeks' prior written notice or who is discharged for cause involving monetary or material loss to the Company shall not be paid for any vacation earned under this Article.

19.5 Eligible employees shall receive vacation pay in advance of their vacation, provided pay therefor is requested in writing at least two (2) weeks in advance of the pay day immediately prior to the date approved for the start of such vacation.

19.6 Consistent with efficiency and economy of operations, an employee may be permitted to split his vacation into two (2) sections.

19.7 An extra day will be added to the employee's paid vacation if a holiday covered under HOLIDAYS Paragraph 19.1 herein falls within the vacation period.

19.8 Vacations shall be based on the anniversary of the employee's date of hire. Choice of vacations shall be by seniority in the bargaining unit.

19.9 Vacation credit will accrue during any calendar month to eligible employees who are on active status, sick leave or vacation for more than one-half the calendar month.

19.10 Compensation for the vacation period shall be computed at the employee's base rate of pay (including shift differential) in effect at the time the vacation is taken.

ARTICLE 20

Leaves of Absence

20.1 Upon approval of the Company, a leave of absence of up to ninety (90) days in any twelve-month period may be granted to an employee. During such leave, the employee's seniority shall accumulate. The Company may extend such leaves of absence, but if such leave is extended by the Company, the employee will retain, but not continue to accrue, seniority.

20.2 An employee accepting gainful employment while on leave of absence, except as expressly approved by the Company in writing, automatically terminates employment with the Company and seniority hereunder.

20.3 Any employee elected or appointed for full-time Union activity necessitating a leave of absence shall be granted such leave not to exceed one (1) year and shall, at the end of such leave, be reinstated if there is sufficient work for which he or she may be eligible in accordance with seniority and ability, at the then current rate of pay. Seniority will accumulate during the period of such leave, which may be renewed upon prior written application.

20.4 Leaves of absence may be granted to employees for other Union activities, and seniority shall accumulate during such leaves. Such leaves will be granted only when requests are made by the International Union or the local Union.

20.5 Employees who, by reason of bona fide illness, require time off will be granted a leave for up to one (1) year, or the length of their seniority, but in no event to exceed three (3) years, during which time seniority shall continue to accumulate.

20.6 Time spent on leave of absence shall not apply towards vacation or sick leave credits. Employees eligible for group insurance hereunder will have the employee portion of such insurance paid by the Company only for the first thirty (30) days of such leave.

ARTICLE 21

Sick Leave

21.1 Full time employees who have completed the probationary period shall thereafter accrue one (1) day of sick leave for each month of service, cumulative to thirty (30) days.

21.2 The employees and the Union recognize their obligation to prevent unnecessary absences or any other abuses of the sick leave privilege. The Company may discipline employees who abuse the sick leave privileges.

21.3 Sick leave credit will accrue during any calendar month to eligible employees who are on active status, sick leave, or vacation for more than one-half of the calendar month.

21.4 Any full time employee absent from work due to illness shall receive sick leave pay for which he is eligible hereunder at the straight-time hourly rate for the number of hours of work scheduled.

21.5 Full time employees, during the first three (3) years of employment, shall not receive sick leave pay

for the first three (3) days of each illness, except in the case of employees hospitalized for one (1) full day or longer due to illness or injury.

ARTICLE 22

Sickness and Disability Benefits

22.1 Full time employees will continue to receive their present group insurance plan covering life, hospital, surgical benefits, providing the employee has completed or completes and signs an enrollment card in accordance with the Company's enrollment procedures. New employees will be afforded an opportunity to enroll upon completion of their probationary period.

22.2 Premiums for employees' dependents' hospital, surgical and major medical benefits will be handled through payroll deductions.

22.3 In the event of any increase necessary to continue the present level of benefits provided by the Company, the Company will either reduce the level of benefits as required to maintain the present Company cost or make the plan contributory, at the option of the Union.

22.4 For all employees sixty-five (65) and over all hospital, surgical, and medical benefits will be handled under the Federal Medicare program.

ARTICLE 23

Uniforms

23.1 The Company will continue its present policy with respect to the furnishing of uniforms and equipment.

23.2 Beginning April 29, 1967 and thereafter, each employee will receive a uniform maintenance allowance of $1.00 per week to be administered on the basis of twenty cents (20¢) per shift worked.

ARTICLE 24

GENERAL

24.1 It is not the intent of either party to this Agreement to violate any Federal, State or local laws governing the subject matter contained herein. All parties who are signatory to the terms of this Agreement agree that if any provisions contained herein are finally held or determined to be illegal or void by a court of final and competent jurisdiction, the parties shall promptly enter into negotiations concerning the affected clauses for the purpose of achieving conformity with the requirements of the applicable law.

24.2 The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject matter. Therefore, the Company and the Union each agree that the other shall not be obligated to bargain on any other subject during the life of this Agreement, provided, however, this paragraph shall not be construed so as to modify or supersede any other provision of this Agreement.

24.3 In the event of death in the immediate family of an employee, the employee will be granted up to three (3) days' emergency leave, with pay, not including the employee's days off, providing the employee substantiates the need for the leave. For the purpose of this paragraph, the immediate family is defined as the father, mother, sister, brother, fater-in-law, mother-in-law, spouse and children of the employee.

24.4 Supervisory employees normally will not perform the duties of employees in the bargaining unit other than in emergency situations or for purposes of instructing employees.

24.5 Employees subpoenaed for jury duty shall be compensated at their regular rate for eight (8) hours' pay for each scheduled work shift during which they served

on jury duty, less any jury duty fee received. Employees shall be required to produce satisfactory evidence that they were called for and required to serve on a jury before being entitled to jury pay. This paragraph shall not apply to probationary employees.

24.6 The re-employment and seniority status of any employees hereunder who, while in the active service of the Company, enter the armed services or, during wartime enter the Merchant Marine of the United States, shall be governed by the provisions of the Selective Service and Training Act of 1958, as amended, or other applicable law.

24.7 Employees covered by this Agreement shall not normally be required to perform duties other than those normally performed by employees in the bargaining unit, except in cases of emergency.

24.8 The Company recognizes the need for safe, sanitary, and healthful working conditions and will endeavor to accomplish these aims. No employee shall be discharged for refusing to work on a job not made reasonably safe or sanitary for him, or that might unduly endanger his health.

24.9 Employees shall be granted relief from time to time, as necessary.

24.10 The Company recognizes that exposure to inclement weather is not desirable, and will endeavor to accomplish adequate relief and to prevent excessive exposure, including proper protection for individuals exposed to such conditions.

24.11 No employee shall be required to transfer out of the bargaining unit.

ARTICLE 25

DURATION

25.1 Except where otherwise provided herein, this Agreement becomes effective on April 29, 1967, and shall continue in full force and effect until midnight, April

28, 1970, and from year to year thereafter ,unless either party gives written notice, not less than sixty (60) days, nor more than ninety (90) days, immediately prior to the expiration date, of its intention to amend, modify or terminate this Agreement.

IN WITNESS WHEREOF, the parties hereto have signed this Agreement this the 29th day of April 1967.

For:	For:
International Union, United Plant Guard Workers of America	The Wackenhut Corporation
And Its Amalgamated Local No. 162.	
/s/ Ronald Gilman	/s/ William Bitten, Jr.
/s/ Elmer H. Reitzel	/s/ Arthur C. Potter
/s/ Thomas C. Ware	/s/ Russell F. Frazier
/s/ Charles A. Blankemeier	

APPENDIX "A"

It is agreed that if, at anytime during the life of this Agreement, a wage and fringe benefit determination is issued by the Department of Labor affecting employees covered by this Agreement, all parties hereto agree to comply with such determination and place such determination into effect immediately.

EXHIBIT No. 4

[UPGWA Emblem]

INTERNATIONAL UNION
UNITED PLANT GUARD WORKERS OF AMERICA
International Headquarters:
14214 East Jefferson, Detroit, Michigan 48215

James C. McGahey
President

Ray C. Hilderbrandt
Secy.-Treas.

Telephone 821-1132

July 12, 1967

William J. Burns International
Detective Agency
235 East 42nd Street
New York, New York 10017

Gentlemen:

We have been informed that your Agency has been awarded a contract for guard services at the Lockheed Aircraft Service Company in Ontario, California, effective July 1, 1967.

You are hereby advised that the International Union United Plant Guard Workers of America (UPGWA) and its Amalgamated Local Union No. 162, is the exclusive bargaining representative of plant guards in an appropriate unit at that facility.

On March 8, 1967, our Union was certified by the National Labor Relations Board in Case No. 31-RC-455 as the exclusive representative of all guard employees. That Certification is presently outstanding and binding upon your Agency.

The bargaining unit is covered by a current collective bargaining agreement dated April 29, 1967, a copy of which is enclosed herewith.

Demand is hereby made that you recognize our Union as the exclusive representative of all guard employees in the appropriate unit at Lockheed Aircraft Service

Company and that you honor the collective bargaining agreement.

In the event you refuse or fail to honor this request within five (5) days of receipt thereof, appropriate legal action will be instituted.

I also request that our respective representative meet at the earliest possible opportunity for the purpose of discussing any problems resulting from your assumption of operations at Lockheed.

Very truly yours,

/s/ James C. McGahey
JAMES C. MCGAHEY
President, International Union
United Plant Guard
Workers of America

JCM:ka
opeiu 42
encl.

Registered Mail—R.R.R.

cc: Burns Inter'l. Detective Agency, Los Angeles, California, w/encl.

Lockheed Aircraft Service Company, Ontario, California, w/encl.

R. R. Mettenet, President, Local 162

Ronald Gilman

Gordon Gregory

EXHIBIT NO. 5

July 24, 1967

Mr. James C. McGahey, President
International Union, United Plant
Guard Workers of America
14214 East Jefferson
Detroit, Michigan 48215

Dear Mr. McGahey:

This will confirm receipt of your July 12, 1967 letter and enclosure which has been referred to my attention and which arrived while I was out of the office.

The matter is being reviewed but I would understand that any guards employed by our Los Angeles office at Lockheed Aircraft Service Co. in Ontario, California are members of and are represented by American Federation of Guards, Local 1, a Union with whom our Los Angeles office now has a collective bargaining agreement and has had for over a period of years. There is, accordingly, a substantial good faith doubt here that your claim is valid.

Yours very truly,

THE WILLIAM J. BURNS
INTERNATIONAL DETECTIVE
AGENCY, INC.

J. M. GERATY

JMG:ms

GENERAL COUNSEL'S EXHIBIT No. 4

Membership No. _____

APPLICATION PLEDGE FOR MEMBERSHIP
in
—LOCAL 1—
AMERICAN FEDERATION OF GUARDS
Room 218—4157 West 5th Street
Los Angeles 5, California
DUnkirk 7-3120

Please Print: Date _____ 196___

Name of Applicant _____ Telephone No. _____

Street Address _____ City _____ Zone _____

Occupation _____ Where Employed _____

Date of Birth _____ Initiation Fee $5.00

TO SUPERSEDE ANY AND ALL REPRESENTATIVE AUTHORIZATION GUARD PLEDGES:

I agree and understand that the Secretary-Business Representative or any authorized representative, of the American Federation of Guards has full authority to represent me, and in my behalf, in any matters pertaining to grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, with employers, their representatives, or any one else, pending my application for membership being accepted by this organization and during the life of my membership.

_____ /s/ Jack Foley
Signature of Applicant Signature of Organizer

UNION SHOP AUTHORIZATION

I hereby authorize the American Federation of Guards to negotiate a union shop agreement with my employer.

_____
Signature of Applicant
(void if not signed)

NO MONIES REFUNDED

GENERAL COUNSEL'S EXHIBIT NO. 6

AGREEMENT

THIS AGREEMENT made and entered into this 21st of March 1967, by and between the Los Angeles, California, Office of The William J. Burns International Detective Agency, Incorporated, at 2323 Beverly Boulevard, Los Angeles, California 90057, hereinafter referred to as the "Employer", and THE AMERICAN FEDERATION OF GUARDS, LOCAL NO. 1, at 4157 West Fifth Street, Los Angeles, California, hereinafter referred to as the "Union", witnesseth:

Section 1. Recognition. The Employer recognizes the Union as the exclusive bargaining agent for all security guards employed by the Employer in Los Angeles County, California, excluding, however, all other employees of the Employer, including office clerical employees and supervisors as defined in the National Labor Relations Act, as amended.

Section 2. Union Security. All employees of the Employer subject to the terms of this Agreement shall, on or before sixty (60) days following their initial employment or the effective date of this Agreement, whichever is later, remain and be members of the Union as a condition of their continued employment; provided, that no employee's employment shall be terminated for non-membership in the Union if the Employer has reasonable grounds for believing that membership in the Union was not available to the employee on the same terms and conditions generally applicable to other members or that membership was denied or terminated for reasons other than the failure of the employee to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership. This section for Union security shall be effective and valid only so long as it is not contrary to law or orders of the National Labor Relations Board. The Employer agrees to inform the Union in writing within ten (10) days of the first employment of any employee of such employee's name and first date of employment.

Section 3. Seniority. When laying off or rehiring employees, the Employer will give due regard to the following factors:

(1) Length of active service with the Employer;
(2) Ability to perform the work; and
(3) Physical fitness.

When all such factors, except length of active service with the Employer, are relatively equal in the Employer's opinion, length of service will govern.

In case of a reduction of forces by a client, the principle of seniority shall apply, subject, however, to the requirement that the senior man must, in the Employer's opinion, have the qualifications to perform the remaining job or jobs. Unless the senior man has such qualifications, in the Employer's opinion, men having less seniority may be retained to perform such jobs.

Section 4. Overtime Pay. Any work performed by an employee in excess of forty (40) straight time hours in any one work week shall be paid for at the rate of one and one-half (1½) times the employee's basic straight time hourly rate.

Section 14. Classification and Wage Rates.

(A) Guard job classifications and the rates of pay applicable thereto shall be as listed below. All new guard Employees shall be first assigned to the "All Guards" category. Thereafter, advancement by a guard into the Brewery or Universal category shall not be automatic but rather shall first be conditioned upon an actual assignment to a vacancy within any such classification, the decision thereafter to fill any such assignment vacancy and the selection of a particular guard for such assignment to be within the sole discretion of the Employer.

WAGE RATE SCHEDULE 1-1-67 to 12-31-68

LENGTH OF SERVICE	Effective 1-1-67	Effective 1-1-68
ALL GUARDS (except at the breweries or Universal)		
New Hires	1.40	1.60
6 months	1.43	1.63
12 months	1.48	1.68
24 months	1.58	1.78
GUARDS AT BREWERIES		
New Hires	1.45	1.65
6 months	1.50	1.70
12 months	1.55	1.75
24 months	1.65	1.85
GUARDS AT UNIVERSAL		
New Hires	2.01	2.01
6 months	2.10	2.10
12 months	2.35	2.35
24 months	2.45	2.45

(B) Guard employees on the Employer's payroll as of the effective date of this Agreement will be assigned to the pay classification determined by their length of service with the Employer but no guard employee shall have his aforesaid wage rate reduced thereby.

(C) Sergeants shall receive for their work a differential of $0.10 per hour over and above their basic straight time hourly rate; except at Universal City where Sergeants shall receive $0.25 per hour above their basic straight time hourly rate.

Section 15. It is agreed that the wage rates set forth in Section 14 above shall not apply to the Employer's guards who are assigned to the following companies if and when the Employer obtains such companies as clients:

1. Douglas Aircraft Company, Inc., Long Beach, California
2. Walt Disney Productions, Burbank, California
3. Desilu Productions, Los Angeles, California

4. Columbia Pictures, Inc., Los Angeles, California
5. Sam Goldwyn Motion Pictures Studio, Los Angeles, California
6. General Service Studios, Los Angeles, California
7. Producers Studio, Los Angeles, California
8. Metro Goldwyn Mayer Studio, Culver City, California
9. Republic City (CBS Studio Center), North Hollywood, California
10. Technicolor Corporation, Los Angeles, California
11. Metromedia, Inc. (KTTV Studio), Los Angeles, California
12. Coca Cola Bottling Company, Los Angeles, California
13. Consolidated Lumber Company, Wilmington, California
14. Sun Lumber Company, Long Beach, California
15. General Motors Corporation, South Gate, California
16. Associated Banning Company, Wilmington, California
17. Indies Terminal Corporation, Wilmington, California
18. Ocean Terminals, Inc., Wilmington, California
19. Outer Harbor Dock and Wharf, Inc., San Pedro, California
20. William Diamond and Company, Wilmington, California
21. United Fruit Company, Wilmington, California
22. Star Kist Food, Inc., Terminal Island, California

In the event that the Employer does sell its guard services to any of the above-mentioned companies, it is agreed that the Employer and the Union will negotiate wage rates for guards assigned to such companies and thereafter set forth such rates in a supplement to this agreement.

Section 16. Management.

The Employer has and will retain the exclusive right and power to manage its business, and to direct the working force, including but not limited to the right to

hire, suspend, discharge, promote, or transfer its employees for proper cause, subject to the pertinent terms of this Agreement. This statement of management rights which remain unimpaired by this Agreement is not intended to exclude others which are not mentioned herein.

Section 17. No Strike—No Lockout.

During the term of this Agreement, the Union shall not authorize, cause, engage in, sanction or assist in any work stoppage or strike against the Employer. The Employer shall not cause, permit or engage in any lockout of members of the Union. It is further agreed that the Employees covered by this Agreement will at all times pass through picket lines of other Unions and will perform their regular duties as guardians of personnel and private property, regardless of strikes, boycotts, or activities of other labor unions.

Section 18. Duration of Agreement.

This Agreement shall be in effect from January 1, 1967 and shall remain in full force and effect through and including December 31, 1968, and thereafter from year to year, unless sixty (60) days before December 31, 1968 or sixty (60) days before any subsequent anniversary date thereof either party hereto gives to the other written notice of a desire to terminate, change or modify the same.

IN WITNESS WHEREOF the parties hereto have executed this Agreement the day and year first above written.

For the Employer

The William J. Burns International Detective Agency, Incorporated

By /s/ [Illegible]

Title: Branch Manager

For the Union

American Federation of Guards, Local No. 1

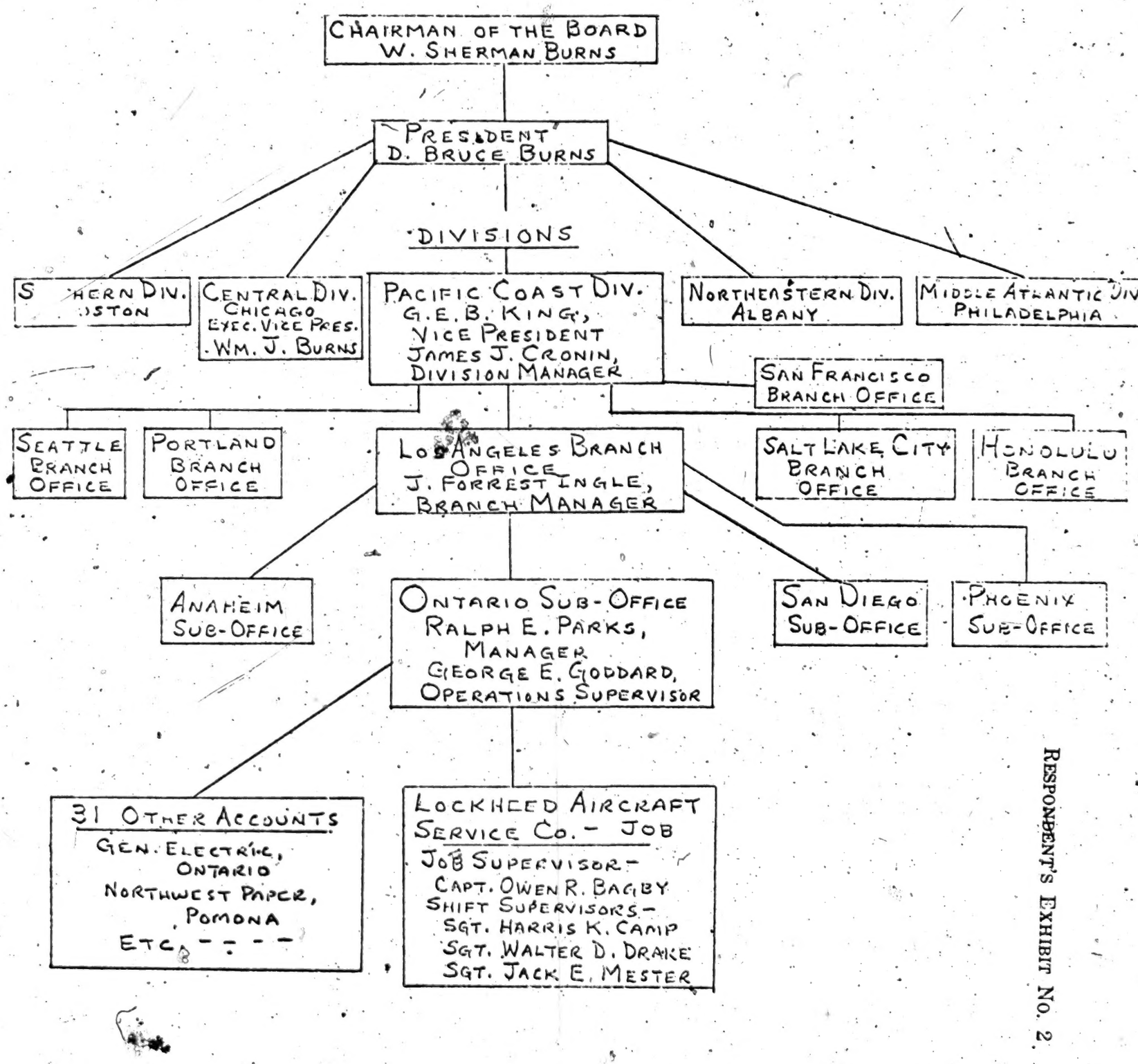
By /s/ Ronald Welk
Secretary-Treasurer

/s/ William F. Newman
Committee

/s/ Clarence A. [Illegible]
Committee

/s/ Philip N. Clarke
Committee

THE WILLIAM J. BURNS
INTERNATIONAL DETECTIVE AGENCY, INC.



RESPONDENT'S EXHIBIT NO. 2.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 401-402—September Term, 1970

(Argued March 8, 1970 Decided April 26, 1971)

Docket Nos. 34889, 35055

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162, INTERVENOR

Before:

HAYS and FEINBERG, *Circuit Judges*, and CURTIN, *District Judge.**

Petition to review and set aside, and cross-application to enforce, an order of the National Labor Relations Board finding violations of Sections 8(a)(2) and (1) of the National Labor Relations Act (29 U.S.C. §§ 158 (a)(2) and (1) (1964)) for unlawfully recognizing and assisting the American Federation of Guards, and finding violations of Sections 8(a)(5) and (1) (29 U.S.C. §§ 158(a)(5) and (1) (1964)) for failure to recognize and bargain with the United Plant Guard Workers of

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* Of the United States District Court for the Western District of New York, sitting by designation.

America and failing to honor the contract executed between that union and the Wackenhut Corporation, Burns' predecessor.

Enforcement granted in part; denied in part.

SEYMOUR SWERDLOW, Los Angeles, California (Charles G. Bakaly, Jr., Richard C. White, Kathleen Peratis, O'Melveny & Myers, Los Angeles, California, on the brief), *for Petitioner.*

NANCY SHERMAN (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Julius Rosenbaum, Attorney, National Labor Relations Board, on the brief); *for Respondent.*

GORDON A. GREGORY, Detroit, Michigan (Gary A. Marsack, Livingston, Gregory, Van Lopik & Higle, Detroit, Michigan, on the brief), *for Intervenor.*

HAYS, *Circuit Judge:*

From 1962 until 1967 the Wackenhut Corporation provided plant protection services for the facility of the Lockheed Aircraft Service Company located at Ontario International Airport, Ontario, California. In 1967 Lockheed arranged with the William J. Burns International Detective Agency, petitioner on this appeal, to take over the plant protection duties from Wackenhut and on May 31, 1967 Lockheed notified Wackenhut that Burns would take over on July 1.

On March 8, 1967 the International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 were certified as representatives of Wackenhut's employees working at Lockheed and on April 29, 1967 Wackenhut and the union entered into a collective bargaining agreement to be in effect from April 29, 1967 until April 28, 1970.

On July 1, 1967 Burns took over the plant protection work at Lockheed. Burns employed for this purpose 42 guards, 27 of whom had previously been employed by Wackenhut.

The United Plant Guard Workers demanded that Burns recognize the union as the exclusive representative of Burns' employees at Lockheed and honor the collective agreement which the union had negotiated with Wackenhut. Burns refused both requests and the union thereupon filed unfair labor practice charges with the Board.

The Board, affirming the Trial Examiner's decision, held that Burns had violated Sections 8(a)(2) and (1) of the National Labor Relations Act (29 U.S.C §§ 158 (a)(2) and (1) (1964)) by unlawfully recognizing and assisting the American Federation of Guards, a "rival" union: that it had violated Sections 8(a)(5) and (1) (29 U.S.C. §§ 158(a)(5) and (1) (1964)) by failing to recognize and bargain with the United Plant Guard Workers of America; and that Burns was obligated to honor the collective bargaining agreement which had been entered into between the latter union and the Wackenhut Corporation. Burns petitions for review of the Board's order except for that portion charging it with unlawful assistance and recognition of the American Federation of Guards; the Board cross petitions to enforce the entire order. We enforce the Board's order except for that part which requires the company to honor the collective agreement between Wackenhut and its union.

I.

The Board found that Burns violated Sections 8(a)(2) and (1) of the Act by unlawfully assisting and recognizing the American Federation of Guards. Although Burns has not petitioned for review of this portion of the order, it apparently seeks to avoid the consequences of the Board's action by stating that it "has elected to comply with the portion of the Board's order requiring it to cease and desist from recognizing the American Federation of Guards as representative of its guards at the Facility." The fact, however, that the em-

ployer is willing to comply does not render the cause moot; the Board may still seek and secure enforcement from the courts. *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950). The Board's finding of unlawful assistance and recognition is amply supported by the record. We enforce that part of its order.

II.

The remainder of the Board's order deals with its finding that Burns unlawfully refused to recognize and bargain with the United Plant Guard Workers of America and to honor the collective bargaining agreement which that union negotiated with Burns' predecessor, Wackenhut.

Burns first contends that a bargaining unit limited only to Burns guards working in Lockheed is not appropriate and that therefore, the Board's order is not enforceable. Burns argues that the high degree of integration of its Ontario Sub-Office, which managed 30 contracts in addition to the contract at Lockheed, required a bargaining unit encompassing the entire area, particularly in view of the centralized control of labor relations that Burns claims existed there. The Board on the other hand, argues, in support of its findings, that Burns' employees serviced the same facility that was considered an appropriate unit for Wackenhut employees, that Burns' employees had a community of interest, were supervised by one man on a full-time daily basis who had hiring and firing authority, and were paid a distinctly higher wage than other Burns employees in the Los Angeles branch area (which included Ontario).

The Board has a large measure of discretion in making unit determinations. See *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947); *Continental Insurance Co.* v. *NLRB*, 409 F.2d 727, 728 (2d Cir.), cert. denied, 396 U.S. 902 (1969). The centralization of final decisions on labor policy is not per se decisive of the extent of an appropriate unit where the Board has substantial justification for establishing a smaller unit. *Continental Insurance Co.* v. *NLRB*, *supra* at 729. We cannot say that the Board lacked such justification in this case.

We agree as well with the Board's finding that Burns is a successor employer to Wackenhut and as such is required to recognize the union chosen by Wackenhut's employees. See, e.g., *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F.2d 1025, 1026-27 (7th Cir. 1969). The determination that an employer is a successor is made on the basis of "continuity in the business operation," *NLRB* v. *Zayre Corp.*, 424 F.2d 1159, 1162 (5th Cir. 1970), that is, whether the operation is "essentially the same as that previously conducted . . . ." *S. S. Kresge Co.* v. *NLRB*, 416 F.2d 1225, 1234 (6th Cir. 1969). Has the "employing industry . . . retained its identity and continuity to a degree sufficient to make it reasonable that the successsor employer be required to recognize the incumbent union[?]" (*Tom-A-Hawk Transit, Inc.* v. *NLRB*, *supra* at 1027.) We think that it has in the instant case.

All of the important factors which the Board has used and the courts have approved are present in the instant case: "continuation of the same type of product lines, departmental organization, employee identity and job functions." *NLRB* v. *Zayre Corp.*, *supra* at 1163 (footnotes omitted). Both Burns and Wackenhut are nationwide organizations; both performed the identical services at the same facility; although Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors; and finally, and perhaps most significantly, Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42.[1]

---

[1] Although the absence of wholesale hiring of predecessor's employees does not require a finding that there has been no successorship, see *Monroe Sander Corporation* v. *Livingston*, 377 F.2d 6, 12 (2d Cir.), cert. denied, 389 U.S. 831 (1967), its presence is relevant "to show similarity of operations." *Id.* The Court in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 551 (1964) placed great stress on this single factor by holding that "relevant similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty."

III.

From the fact that Burns was the successor of Wackenhut within the meaning of that term as applied by the Board and the courts, and was required to recognize the union chosen by Wackenhut's employees, it does not follow that Burns could be ordered by the Board to honor the collective agreement to which Wackenhut and its union were parties. In none of the previous successorship cases has the Board ever reached that result. The successor has always been held merely to have the duty of bargaining with his predecessor's union. We conclude that in ordering Burns to honor the contract executed by Wackenhut, the Board has exceeded its powers. Neither the applicable case law nor the national labor policy justifies the Board in imposing a collective agreement upon an unwilling party who had no part in the negotiation of the agreement.

The action of the Board in this case is contrary to the letter as well as the spirit of the Supreme Court's recent decision in *H. K. Porter Co., Inc.* v. *National Labor Relations Board*, 397 U.S. 99 (1970). That case held that the Board and the courts "[are] without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement." *Id.* at 102. As the Court points out, the legislative history of the National Labor Relations Act and of the enactment of § 8(d) of the Act,[2] strongly supports the conclusion that "the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *Id.* at 108.

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[2] Section 8(d) reads as follows:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession*. . . ." 29 U.S.C. § 158(d) (emphasis added).

> "While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *Id.* at 108.

The Board professes to find authority for its order to Burns to honor the Wackenhut contract in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964).

The Board does not claim that *Wiley* stands directly for the proposition that all of a predecessor's contractual obligations can be imposed on an unwilling successor. The holding of *Wiley* is merely that "in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement." *Id.* at 548. Indeed, the *Wiley* case arose in the context of an action to compel arbitration under § 301 of the Labor Management Relations Act. (29 U.S.C. § 185 (1964).)

The Board contends, however, that the policy considerations upon which *Wiley* is based support its action in this case. But the policy behind the decision in *Wiley* was founded upon the Court's recognition of "the central role of arbitration in effectuating national labor policy." *Id.* at 549.[3] The Court's determination is only that "the impressive policy considerations favoring arbitration are

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[3] The Court repeatedly emphasized this basis for its decision and the limited effect of its holding:

> "Here, the question is whether Wiley, which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, is bound at all *by the agreement's arbitration provision.*
>
> . . .
>
> . . . It would derogate from *'the federal policy of settling labor disputes by arbitration,'* . . . if a change in the corporate structure and ownership of a business enterprise had the automatic consequence of *removing a duty to arbitrate* previously established." *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 547, 549 (1964) (citation omitted) (emphasis added).

not wholly overborne by the fact that Wiley did not sign the contract being construed." *Id.* at 550 (footnote omitted).

Although it is true that a rule such as that promulgated by the Board would put future potential successor employers on notice that existing contracts would be obligatory on them and thus provide them with a choice of action, the rule would bind the union to a contract with a successor employer without giving it any opportunity for choice. This could sometimes result in serious inequities. For example, where a union made substantial concessions to a failing employer in order to keep him in business and then discovered that the successor was a strong, financially viable organization, it would have no chance to bargain anew. The Board's holding that it will consider "unusual circumstances" (see, e.g., *Emerald Maintenance, Inc.*, 188 N.L.R.B. No. 139 (1971) where the Board, citing "unusual circumstances," refused to apply the rule it had earlier laid down in *Burns*) is no answer since it merely arrogates to the Board the additional power to pick and choose among the contractual provisions it will impose on non-contracting parties.

We refuse enforcement to that portion of the Board's order that requires Burns to honor the terms of the collective agreement between the union and Wackenhut.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 34889, 35055

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162, INTERVENOR

JUDGMENT

Before: Hays, and Feinberg, Circuit Judges, and Curtin, District Judge.*

THIS CAUSE came on to be heard upon a petition to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board dated May 7, 1970, against the above-named Petitioner, its officers, agents, successors and assigns. The Court heard argument of respective counsel on March 8, 1971, and has considered the briefs and transcript of record filed in this cause. On April 26, 1971, the Court being fully advised in the premises handed down its opinion granting in part and denying in part enforcement of the Board's said order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that The William J. Burns International Detective Agency, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively, upon request, with International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162

* Of the United States District Court for the Western District of New York, sitting by designation.

(the "Union") as the exclusive bargaining representative of all of its employees in the following collective bargaining unit: all full-time and regular part-time employees performing plant protection services, as determined by Section 9(b)(3) of the National Labor Relations Act, as amended, at Lockheed, Ontario International Airport; excluding office clerical employees, supervisors, and all other employees as defined in the Act.

(b) Assisting or recognizing the American Federation of Guards (the "AFG") as the representative of its employees in the above-described unit for the purposes of collective bargaining, unless and until said labor organization shall have been certified as the exclusive bargaining representative of said employees in the above-described unit.

(c) Interfering with representation of its employees through labor organizations of their own choosing.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to join or assist the Union.

2. Take the following affirmative action:

(a) Withdraw and withhold recognition from AFG as representative of its employees in the above-described unit.

(b) Bargain collectively, upon request, with the Union, with respect to its employees in the above-described unit, and, if any understanding is reached, embody such understanding in a signed agreement.

(c) Post at its Lockheed, Ontario, California, operations, copies of the notice attached hereto as "Appendix." Copies of said notice, to be furnished by the Regional Director for Region 31 (Los Angeles, California) shall, after being signed by Petitioner's authorized representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by any other material.

(d) Notify said Regional Director, in writing, within 10 days from the date of this Judgment what steps Petitioner has taken to comply herewith.

PAUL R. HAYS
Judge, United States Court of Appeals for the Second Circuit

WILFRED FEINBERG
Judge, United States Court of Appeals for the Second Circuit

Filed: May 18, 1971

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Judgment of the United States Court of Appeals enforcing in part an order of the

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT
(as amended)

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively, upon request, with International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 as the exclusive bargaining representative of our employees in the following appropriate unit:

> All our full-time and regular part-time employees performing plant protection duties as determined by Section 9(b)(3) of the National Labor Relations Act, as Lockheed, Ontario International Airport; excluding office clerical employees, supervisors, and all other employees as defined in the Act.

WE WILL NOT assist or recognize American Federation of Guards, Local 1, as the representative of our employees for the purposes of collective bargaining, unless and until it shall have been certified as the exclusive bargaining representative of our employees in the above unit.

WE WILL NOT interfere with representation of our employees through labor organizations of their own choosing.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights to join or assist the

United Plant Guard Workers or otherwise engage in activities protected by the Act.

WE WILL withdraw and withhold recognition from American Federation of Guards as representative of employees in the above unit until or unless it is certified as bargaining representative of our employees in said unit.

WE WILL bargain, upon request, with United Plant Guard Workers with respect to employees in the above unit, and, if any understanding is reached, embody such understanding in a signed agreement.

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.
(Employer)

Dated ..... By .....

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Bldg., Room 12100, 11000 Wilshire Blvd., Los Angeles, California, 90024, Telephone No. 824-7351.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 34,889, 35,055

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

etc.

It is hereby ordered that the motion made by counsel for the respondent, National Labor Relations Board, to vacate the judgment filed herein on May 18, 1971 and file in lieu thereof the Board's second proposed judgment, be and it hereby is granted to the extent of adding the following paragraph to the judgment of May 18, 1971, denominated as paragraph 2(c):

> (c) Make whole all persons employed in the above described unit for any loss of pay or other benefits they may have suffered as a result of reimbursement to be made in accordance with *F. W. Woolworth Co.*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Paragraphs denominated 2(c) and 2(d) in the original judgment filed May 18, 1971 are now denominated 2(d) and 2(e), respectively. By this action we reverse our order of June 30, 1971, which denied the same motion made by the respondent, National Labor Relations Board.

/s/ Paul R. Hays
(PAUL R. HAYS)

/s/ Wilfred Feinberg
(WILFRED FEINBERG)
U.S.C.J.J.

/s/ John T. Curtin
(JOHN T. CURTIN)
U.S.D.J.

Dated July 12, 1971

SUPREME COURT OF THE UNITED STATES

No. 71-123

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BURNS INTERNATIONAL SECURITY SERVICES, INC., ET AL.

ORDER ALLOWING CERTIORARI. Filed October 12, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is consolidated with No. 71-198 and a total of one hour is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

BURNS INTERNATIONAL SECURITY SERVICES, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ORDER ALLOWING CERTIORARI. Filed October 12, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, limited to Question 2 presented by the petition which reads as follows:

"2. In such a proceeding, may a sub-contractor who is awarded a contract to provide services at a facility be held to be a successor of the previous sub-contractor and required to bargain with the union representing the previous sub-contractor's employees, where: (a) there is a total absence of dealings between the two sub-contractors; (a) there is a total absence of dealings between the two sub-contractors; (b) the previous sub-contractor's performance at the facility constitutes a small portion of its total business, the balance of which was not affected by the change of sub-contractors; (c) the performance of the contract is integrated into the new sub-contractor's previously existing business; (d) there is a change in supervision at the facility by the new sub-contractor; and (e) within six months after the awarding of the contract the previous sub-contractor's employees constitute less than a majority of employees employed at the facility?"

The case is consolidated with No. 71-123 and a total of one hour is allotted for oral argument.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 448725 282

71-123

No.

JUL 23 1971

E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ERWIN N. GRISWOLD,
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit insofar as it declined to enforce the Board's order, requiring the successor employer to honor the outstanding collective bargaining agreement into which its predecessor entered with the employees' union representative.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 15-23) is not yet officially reported. The decision and order of the Board (App. C, 25-57) are reported at 182 NLRB No. 50.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1971, and was amended on July 12, 1971 (App. B, 24-24(f)). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a successor employer violates Section 8(a)(5) and Section 8(d) of the National Labor Relations Act by refusing to adopt and honor the outstanding collective bargaining agreement which its predecessor executed with the employees' union representative.

STATUTES INVOLVED

The relevant statutory provisions are set forth in App. D, 58-60.

STATEMENT

A. The Board's Findings of Fact

The Wackenhut Corporation, a nationwide guard service firm, provided plant protection services for Lockheed Aircraft Service Company ("Lockheed") at Ontario International Airport in California between 1962 and July 1, 1967 (App. C, 27, 40, 41; R. 67, 57-58, 86-88; E. 5).[1] On March 8, 1967, the Board certified the International Union, United Plant Guard Workers of America ("the Union") as the exclusive bargaining representative of Wackenhut's full-time and regular part-time employees performing plant

[1] "R." refers to the appendix filed with the court of appeals containing portions of the transcript of testimony. "E." refers to the separate volume of exhibits filed with that court.

protection duties for Lockheed at that airport (App. C, 27, 41; E. 7; R. 2-3). Wackenhut and the Union entered into a three-year collective bargaining agreement, which contained a clause making the agreement binding on "successors and assigns," on April 29, 1967 (App. C, 27, 42; E. 8(4)).

Lockheed's one-year contract with Wackenhut expired on June 30, 1967. In early 1967, Lockheed, as permitted by its contract, invited various guard services to bid for the job then being done by Wackenhut (App. C, 27, 42; E. 5(4)). The successful bidder was the William J. Burns International Detective Agency, Inc., another nationwide guard service firm (App. C, 27, 39-40, 42; E. 1 (1-2), 2(1), 3(1), 5(1), 13).[2]

During June 1967, Burns assisted the American Federation of Guards, Local 1 ("AFG") in organizing Wackenhut guards who applied for jobs with Burns (App. C, 27, 28, 42-46, 51; R. 7-22, 25-29, 30-43, 46-50; E. 12). Some of these employees were advised that Burns "couldn't live with [the Union's] contract," and that they had to join the AFG in order to work for Burns (App. C, 42, 44, 45, 46; R. 20, 28, 37-38, 42). On June 29, Burns' branch manager, Ingle, concluded that a majority of the employees to be assigned to the Lockheed job had signed AFG applications and, accordingly, recognized the AFG as their bargaining representative (App. C, 27, 48; R. 109-113, E. 3(2)).

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[2] Prior to making its bid, Burns was informed by Lockheed of the Union's recent certification and its current contract with Wackenhut (App. C, 27, 42; R. 116; E. 4).

Burns officially began performing the guard services on July 1 (App. C, 27, 42; E. 5(1)). On that date Burns' Lockheed work force of 42 employees consisted of 27 guards who had formerly been employed by Wackenhut and 15 employees who were transferred from other Burns jobs (App. C, 27-28, 42; E. 7(2); R. 112-113). The Burns guards performed basically the same services that guards had performed for Wackenhut (App. C, 27-28, 42, 47; R. 22-24, 29, 40, 43-44).[3]

On June 12, the Union demanded that Burns recognize it as the bargaining representative of Burns' employees at Lockheed and honor the collective bargaining agreement between the Union and Wackenhut (App. C, 28, 48, 50; E. 9). Burns declined to recognize the Union, by letter of June 24, because "any guards employed by our Los Angeles office at Lockheed * * * are members of and are represented by [AFG], a Union with whom our Los Angeles office now has a collective bargaining agreement and has had for over a period of years" (App. C, 28, 48, 50; E. 10).

B. The Board's Decision and Order

The Board held that Burns violated Section 8(a)(2) and (1) of the Act by assisting AFG in organizing employees and by recognizing AFG when it did not represent an uncoerced majority of Burns' em-

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[3] Although Burns mostly used its own supervisors, they performed functions similar to those performed by Wackenhut's supervisors (R. 62-65, 95-99). Burns' job supervisor at Lockheed had, in fact, worked for Wackenhut prior to the takeover (R. 98).

ployees (App. C, 28). The Board also found that Burns was a successor employer to Wackenhut since it employed a majority of former Wackenhut employees and continued essentially the same operation. Accordingly, it held that Burns violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union (App. C, 28). Finally, the Board (with Member Jenkins dissenting) held that, as a successor to Wackenhut, Burns was obligated to honor the contract between Wackenhut and the Union, and that, by failing to do so, Burns further violated Section 8(a)(5) and (1) of the Act (App. C, 28-37).

In concluding that Burns was bound by its predecessor's collective bargaining agreement, the Board relied centrally on this Court's decision in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (App. C, 28-31). The Board concluded that its decision effectuated the policies of the Act, particularly "Congress' recognition [in Section 8(d), App. D, 58-60] of the paramount role in maintaining industrial peace played by parties' adherence to existing collective-bargaining agreements" (App. C, 32-33). It added (App. C, 34):

> In the normal case, we perceive no real inequity in requiring a "successor-employer" to take over his predecessor's collective-bargaining agreement * * *. He can make whatever adjustments the acceptance of such obligation may dictate in his negotiations concerning takeover of the business. Normally employees cannot make a comparable adjustment. Their basic security is the collective-

bargaining agreement negotiated on their behalf. * * *[4]

The Board ordered Burns to cease and desist from its unfair labor practices; to withdraw and withhold recognition from the AFG unless and until it was certified by the Board; to bargain collectively with the Union on request; to honor, adopt, and enforce the contract between Wackenhut and the Union, to give it retroactive effect, and to make the employees whole for any losses suffered by reason of Burns' refusal to honor the contract; and to post appropriate notices (App. C, 35, 51-57).

C. The Decision of the Court of Appeals

The court of appeals sustained the Board's finding that Burns violated Section 8(a)(2) and (1) of the Act by unlawfully assisting and recognizing the AFG (App. A, 18). It also sustained the Board's findings that a bargaining unit limited to Burns guards working at Lockheed was appropriate; that Burns was a successor employer to Wackenhut; and that, as such, it was required to recognize and bargain with the Union (App. A, 18-20).

The court held, however, that the Board had "exceeded its powers" in ordering Burns to honor the contract executed between Wackenhut and the Union, for, "[n]either the applicable case law nor the national labor policy justifies the Board in imposing a collec-

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[4] In a companion case, the Board held that the successor has a correlative right to insist that the union likewise adhere to the agreement executed with the predecessor. *Kota Division of Dura Corp.*, 182 NLRB No. 51.

tive agreement upon an unwilling party who had no part in the negotiation of the agreement" (App. A, 20-21). The court stated (App. A, 21):

> The action of the Board in this case is contrary to the letter as well as the spirit of the Supreme Court's recent decision in *H. K. Porter, Inc.* v. *National Labor Relations Board*, 397 U.S. 99 (1970). That case held that the Board and the courts "[are] without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement." *Id.*, at 102.

Nor, in the court's view, did *Wiley* sanction such a requirement. It asserted that "the policy behind the decision in *Wiley* was founded upon the Court's recognition of the 'central role of arbitration in effectuating national labor policy' ". The court concluded, therefore, that *Wiley* held only that "the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed" (App. A, 22-23).[4a]

[4a] Accordingly, the court's judgment omits the requirement in the Board's order (App. C, 52, 35) that the Company make the employees whole for any losses suffered by reason of the Company's refusal to honor the contract (App. B, 24 ff.). Because the court found that the Company was under a duty as Wackenhut's successor to bargain with the Union, however, the judgment, as amended, requires the Company to make the employees whole for any losses suffered as a result of unilateral changes in working conditions (App. B, 24 ff.). Cf. *Valleydale Packers, Inc.*, 162 NLRB 1486, 1486-1487, enforced, 402 F. 2d 768 (C.A. 5), certiorari denied, 396 U.S. 825.

REASONS FOR GRANTING THE WRIT

The holding of the court below that a successor employer is not obliged, under the National Labor Relations Act, to honor an outstanding collective bargaining agreement, which his predecessor executed with the employees' union representative, conflicts with a recent decision of the Court of Appeals for the Tenth Circuit and is contrary generally to principles enunciated by this Court and applied by other courts of appeals. Resolution of the issue, moreover, is of manifest importance in the administration of the Act. Review by this Court is thus warranted.

1. An employer who takes over the business of another employer, and continues to operate it in essentially the same manner with a large proportion of the former employees, is a "successor" employer for purposes of the National Labor Relations Act. He is obliged not only to remedy his predecessor's unfair labor practices (see *United States Pipe and Foundry Co.* v. *National Labor Relations Board*, 398 F. 2d 544 (C.A. 5)), but also to honor the predecessor's obligation, if one existed, to recognize and bargain with a union representative. See, *e.g.*, *National Labor Relations Board* v. *Auto Ventshade, Inc.*, 276 F. 2d 303, 304 (C.A. 5); *Makela Welding, Inc.* v. *National Labor Relations Board*, 387 F. 2d 40, 46 (C.A. 6); *Overnite Transportation Co.* v. *National Labor Relations Board*, 372 F. 2d 765, 768 (C.A. 4), certiorari denied, 389 U.S. 838; *National Labor Relations Board* v. *Armato*, 199 F. 2d 800, 803 (C.A. 7). The issue here is whether the bargaining obligation which the Act imposes on a successor employer includes the obligation

to honor the outstanding collective bargaining agreement which the predecessor executed with the union.[5] This question has been the subject of much litigation before the Board,[6] and it is likely to continue to arise. Changes in the ownership of employing enterprises are a normal incident of our dynamic economy; it can fairly be anticipated that a significant number of such enterprises will be covered by a current collective bargaining agreement at the time of a change. A definitive adjudication regarding the successor's obligation to honor the existing agreement would therefore both aid the administration of the Act and enable employers and unions more intelligently to make plans respecting the purchase and sale of business enterprises.

2. The holding of the court of appeals below that a successor employer is not obligated to honor an out-

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[5] It is clear, of course, that the predecessor would violate Section 8(a)(5) and 8(d) of the Act if he failed to honor or abide by the agreement. See *National Labor Relations Board* v. *Strong*, 393 U.S. 357, 359; *National Labor Relations Board* v. *Huttig Sash & Door Co.*, 377 F. 2d 964, 968-969 (C.A. 8).

[6] See, *e.g.*, *Ranch-Way, Inc.*, 183 No. 116, enforced, *Ranch-Way, Inc.* v. *National Labor Relations Board*, No. 368-70, decided June 24, 1971 (C.A. 10); *Interstate 65 Corporation, d/b/a Continental Inn*, 186 NLRB No. 41, pending on application to enforce, C.A. 6, No. 71-1189; *Bachrodt Chevrolet Co.*, 186 NLRB No. 151, pending on application to enforce, C.A. 7, No. 71-1354; *Johnsky, d/b/a Avenue Meat Center*, 184 NLRB No. 94; *Polytech, Inc.*, 186 NLRB No. 148; *Denham, d/b/a Denham Co.*, 187 NLRB No. 53, pending on application to enforce, C.A. 9, No. 71-1943; *Kota Division of Dura Corp.*, 182 NLRB No. 51; *Emerald Maintenance, Inc.*, 188 NLRB No. 139, pending on petition to review, C.A. 5, No. 71-1591; *Travelodge Corp.*, 182 NLRB No. 52; *Davenport Insulation, Inc.*, 184 NLRB No. 114.

standing collective bargaining agreement executed by his predecessor directly conflicts with the decision of the Tenth Circuit in *Ranch-Way, Inc.* v. *National Labor Relations Board*, No. 368-70, decided June 24, 1971 (C.A. 10).[7] In *Ranch-Way*, the court, on facts closely analogous to those involved here,[8] ruled squarely that a successor "is bound by the collective bargaining provisions of an agreement between its predecessor and a union" (App. E, 64).

The decision below also is inconsistent with principles expressed by three other courts of appeals which have ruled that a successor employer is bound, despite his lack of consent, to arbitrate grievances arising under an outstanding collective bargaining agreement negotiated by his predecessor. *United States Gypsum Co.* v. *United Steelworkers*, 384 F. 2d 38 (C.A. 5), certiorari denied, 389 U.S. 1042; *United Steelworkers* v. *Reliance Universal, Inc.*, 335 F. 2d 891 (C.A. 3); *Wackenhut Corp.* v. *United Plant Guard Workers*, 332 F. 2d 954 (C.A. 9). These courts relied, as did the Board in the instant case, upon this Court's decision in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543.

In *Wiley*, a dispute arose between the successor company into which the predecessor had merged and the union which represented the predecessor's em-

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[7] We have reproduced the court's opinion as Appendix E, 61-64, to this petition.

[8] Ranch-Way, the successor, purchased a feed mill from Colorado Milling and Elevator Company. It retained 18 of the 25 employees covered by the collective bargaining agreement, as well as more than 75 percent of the predecessor's customers, and conducted the business "substantially the same as it had been before the sale" (App. E, 63).

ployees regarding the effect of the merger on certain employment conditions.[9] In a suit by the union to compel arbitration under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, the Court held that the successor was bound by the arbitration provisions of the predecessor's collective bargaining agreement. It explained (376 U.S. at 549):

> Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. * * * The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by "the relative strength * * * of the contending forces" * * *.

It is true, as the court below stressed in distinguishing *Wiley*, that the decision there (as well as the appellate decisions, other than *Ranch-Way*, which we be-

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[9] The issues which the union sought to arbitrate were: (1) whether the seniority rights built up by the employees of the predecessor must continue to be accorded them; (2) whether, as part of the wage structure of the employees, Wiley (the successor) had to continue to make payments to the union's security and pension plans; (3) whether the job security and grievance provisions of the contract continued in effect; (4) whether Wiley was liable for severance pay under the contract; and (5) whether Wiley was liable for vacation pay under the contract. 376 U.S. at 552.

lieve are essentially inconsistent with the ruling below) dealt specifically only with the duty to arbitrate. This factor, however, does not warrant a different approach or result with respect to whether the substantive provisions of collective bargaining agreements are binding on successors. Indeed, the duty to arbitrate does not exist in the abstract, but rather, in the context of a particular collective bargaining agreement. As this Court has said, "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597. Accordingly, decisions enforcing the duty to arbitrate necessarily have assumed, at least implicitly, that the provisions of the collective bargaining agreement, which are the subject of arbitration, are essentially binding on successors.[10] Moreover, while it is also true,

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[10] The Ninth Circuit, in *Wackenhut Corp.* v. *United Plant Guard Workers, supra,* for example, stated that, under *Wiley,* "the policy of the national labor laws obligates * * * the successor employer * * * to honor the collective bargaining agreement entered into by its predecessor," 332 F. 2d at 958. In *United States Steelworkers* v. *Reliance Universal Inc., supra,* the Third Circuit added the qualification that, in applying the collective bargaining agreement, "the arbitrator may properly give weight to any change of circumstances created by the transfer of ownership which may make adherence to any term or terms of that agreement inequitable." 335 F. 2d at 895.

In its decision here (App. C, 34) and subsequently (see *Em-*

as the court below emphasized, that the policy favoring arbitration is of central importance to national labor policy, the policy of encouraging the maintenance of existing collective bargaining agreements, which is reflected in Section 8(d) of the National Labor Relations Act,[11] is of equal significance.

This case, finally, is not governed, as the court below held, by *H. K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99. In *Porter*, the parties had never agreed upon a contract covering the unit employees. The Court held that, in these circumstances, the Board could not order an employer to accept a particular provision sought by the union.

In this case, however, a contract has been executed by the predecessor employer and the union without any intervention by the Board, and the new employer, by electing to conduct essentially the same business

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erald Maintenance, Inc., 188 NLRB No. 139, n. 6, p. 9, *supra*), the Board has similarly recognized that there may be "unusual circumstances" which would render it inappropriate to apply the predecessor's contract to the successor. No such circumstances are present here; nor, of course, is there any question at this stage regarding the interpretation and enforcement, by an arbitrator, of a particular contract provision.

[11] Section 8(d) (App. D, 58-59) provides that, "where there is in effect a collective-bargaining contract * * * no party to such contract shall terminate or modify such contract, unless" it serves prescribed notices on the other party and maintains the contract in effect for 60 days thereafter or until its expiration date, whichever is later. It also provides that a party to a collective bargaining contract has the right to refrain from discussing or agreeing to modifications in contract terms or conditions, if such modifications are to take effect prior to the period fixed by the contract for reopening those matters.

operation, with many of the same employees, stands in the predecessor's shoes by operation of law. Accordingly, the situation may properly be viewed just as though the contract had been negotiated by the successor himself. The Court, in fact, noted this critical distinction in *Wiley*, stating (376 U.S. at 550): "This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated." It is, in short, the principle expressed in *Wiley* and followed by other courts of appeals, and not the holding of *Porter*, which controls this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

EUGENE B. GOSLEE,
Acting General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

NANCY M. SHERMAN,
Attorney,
National Labor Relations Board.

JULY 1971.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 401-402—September Term, 1970

(Argued March 8, 1970 Decided April 26, 1971)

Docket Nos. 34889, 35055

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162, INTERVENOR

Before:

HAYS and FEINBERG, *Circuit Judges*, and CURTIN, *District Judge.**

Petition to review and set aside, and cross-application to enforce, an order of the National Labor Relations Board finding violations of Sections 8(a)(2) and (1) of the National Labor Relations Act (29 U.S.C. §§ 158(a)(2) and (1) (1964)) for unlawfully recognizing and assisting the American Federation of Guards, and finding violations of Sections 8(a)(5)

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* Of the United States District Court for the Western District of New York, sitting by designation.

and (1) (29 U.S.C. §§ 158(a)(5) and (1) (1964)) for failure to recognize and bargain with the United Plant Guard Workers of America and failing to honor the contract executed between that union and the Wackenhut Corporation, Burns' predecessor.

Enforcement granted in part; denied in part.

SEYMOUR SWERDLOW, Los Angeles, California (Charles G. Bakaly, Jr., Richard C. White, Kathleen Peratis, O'Melveny & Myers, Los Angeles, California, on the brief), *for Petitioner.*

NANCY SHERMAN (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Julius Rosenbaum, Attorney, National Labor Relations Board, on the brief), *for Respondent.*

GORDON A. GREGORY, Detroit, Michigan (Gary A. Marsack, Livingston, Gregory, Van Lopik & Higle, Detroit, Michigan, on the brief), *for Intervenor.*

HAYS, *Circuit Judge*:

From 1962 until 1967 the Wackenhut Corporation provided plant protection services for the facility of the Lockheed Aircraft Service Company located at Ontario International Airport, Ontario, California. In 1967 Lockheed arranged with the William J. Burns International Detective Agency, petitioner on this appeal, to take over the plant protection duties from Wackenhut and on May 31, 1967 Lockheed notified Wackenhut that Burns would take over on July 1.

On March 8, 1967 the International Union, United Plant Guard Workers of America and its Amalga-

mated Local Union No. 162 were certified as representatives of Wackenhut's employees working at Lockheed and on April 29, 1967 Wackenhut and the union entered into a collective bargaining agreement to be in effect from April 29, 1967 until April 28, 1970.

On July 1, 1967 Burns took over the plant protection work at Lockheed. Burns employed for this purpose 42 guards, 27 of whom had previously been employed by Wackenhut.

The United Plant Guard Workers demanded that Burns recognize the union as the exclusive representative of Burns' employees at Lockheed and honor the collective agreement which the union had negotiated with Wackenhut. Burns refused both requests and the union thereupon filed unfair labor practice charges with the Board.

The Board, affirming the Trial Examiner's decision, held that Burns had violated Sections 8(a)(2) and (1) of the National Labor Relations Act (29 U.S.C. §§ 158(a)(2) and (1) (1964)) by unlawfully recognizing and assisting the American Federation of Guards, a "rival" union; that it had violated Sections 8(a)(5) and (1) (29 U.S.C. §§ 158(a)(5) and (1) (1964)) by failing to recognize and bargain with the United Plant Guard Workers of America; and that Burns was obligated to honor the collective bargaining agreement which had been entered into between the latter union and the Wackenhut Corporation. Burns petitions for review of the Board's order except for that portion charging it with unlawful assistance and recognition of the American Federation of Guards; the Board cross petitions to enforce the entire order. We enforce the Board's order except for that part which requires the company to honor the collective agreement between Wackenhut and its union.

I.

The Board found that Burns violated Sections 8(a)(2) and (1) of the Act by unlawfully assisting and recognizing the American Federation of Guards. Although Burns has not petitioned for review of this portion of the order, it apparently seeks to avoid the consequences of the Board's action by stating that it "has elected to comply with the portion of the Board's order requiring it to cease and desist from recognizing the American Federation of Guards as representative of its guards at the Facility." The fact, however, that the employer is willing to comply does not render the cause moot; the Board may still seek and secure enforcement from the courts. *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950). The Board's finding of unlawful assistance and recognition is amply supported by the record. We enforce that part of its order.

II.

The remainder of the Board's order deals with its finding that Burns unlawfully refused to recognize and bargain with the United Plant Guard Workers of America and to honor the collective bargaining agreement which that union negotiated with Burns' predecessor, Wackenhut.

Burns first contends that a bargaining unit limited only to Burns guards working in Lockheed is not appropriate and that therefore, the Board's order is not enforceable. Burns argues that the high degree of integration of its Ontario Sub-Office, which managed 30 contracts in addition to the contract at Lockheed, required a bargaining unit encompassing the entire area, particularly in view of the centralized control of labor relations that Burns claims existed there.

The Board on the other hand, argues, in support of its findings, that Burns' employees serviced the same facility that was considered an appropriate unit for Wackenhut employees, that Burns' employees had a community of interest, were supervised by one man on a full-time daily basis who had hiring and firing authority, and were paid a distinctly higher wage than other Burns employees in the Los Angeles branch area (which included Ontario).

The Board has a large measure of discretion in making unit determinations. See *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947); *Continental Insurance Co.* v. *NLRB*, 409 F.2d 727, 728 (2d Cir.), cert. denied, 396 U.S. 902 (1969). The centralization of final decisions on labor policy is not per se decisive of the extent of an appropriate unit where the Board has substantial justification for establishing a smaller unit. *Continental Insurance Co.* v. *NLRB; supra* at 729. We cannot say that the Board lacked such justification in this case.

We agree as well with the Board's finding that Burns is a successor employer to Wackenhut and as such is required to recognize the union chosen by Wackenhut's employees. See, e.g., *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F.2d 1025, 1026-27 (7th Cir. 1969). The determination that an employer is a successor is made on the basis of "continuity in the business operation," *NLRB* v. *Zayre Corp.*, 424 F.2d 1159, 1162 (5th Cir. 1970), that is, whether the operation is "essentially the same as that previously conducted . . . ." *S. S. Kresge Co.* v. *NLRB*, 416 F.2d 1225, 1234 (6th Cir. 1969). Has the "employing industry . . . retained its identity and continuity to a degree sufficient to make it reasonable that the successor employer be required to recognize the incumbent union[?]" (*Tom-A-Hawk Transit, Inc.* v. *NLRB, su-*

pra at 1027.) We think that it has in the instant case.

All of the important factors which the Board has used and the courts have approved are present in the instant case: "continuation of the same type of product lines, departmental organization, employee identity and job functions." *NLRB* v. *Zayre Corp.*, *supra* at 1163 (footnotes omitted). Both Burns and Wackenhut are nationwide organizations; both performed the identical services at the same facility; although Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors; and finally, and perhaps most significantly, Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42.[1]

III.

From the fact that Burns was the successor of Wackenhut within the meaning of that term as applied by the Board and the courts, and was required to recognize the union chosen by Wackenhut's employees, it does not follow that Burns could be ordered by the Board to honor the collective agreement to which Wackenhut and its union were parties. In none of the previous successorship cases has the Board

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[1] Although the absence of wholesale hiring of predecessor's employees does not require a finding that there has been no successorship, see *Monroe Sander Corporation* v. *Livingston*, 377 F.2d 6, 12 (2d Cir.), cert. denied, 389 U.S. 831 (1967), its presence is releyant "to show similarity of operations." *Id.* The Court in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 551 (1964) placed great stress on this single factor by holding that "relevant similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty."

ever reached that result. The successor has always been held merely to have the duty of bargaining with his predecessor's union. We conclude that in ordering Burns to honor the contract executed by Wackenhut, the Board has exceeded its powers. Neither the applicable case law nor the national labor policy justifies the Board in imposing a collective agreement upon an unwilling party who had no part in the negotiation of the agreement.

The action of the Board in this case is contrary to the letter as well as the spirit of the Supreme Court's recent decision in *H. K. Porter Co., Inc.* v. *National Labor Relations Board*, 397 U.S. 99 (1970). That case held that the Board and the courts "[are] without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement." *Id.* at 102. As the Court points out, the legislative history of the National Labor Relations Act and of the enactment of § 8(d) of the Act,[2] strongly supports the conclusion that "the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *Id.* at 108.

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[2] Section 8(d) reads as follows:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession.* . . ." 29 U.S.C. § 158(d) (emphasis added).

> "While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *Id.* at 108.

The Board professes to find authority for its order to Burns to honor the Wackenhut contract in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964).

The Board does not claim that *Wiley* stands directly for the proposition that all of a predecessor's contractual obligations can be imposed on an unwilling successor. The holding of *Wiley* is merely that "in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement." *Id.* at 548. Indeed, the *Wiley* case arose in the context of an action to compel arbitration under § 301 of the Labor Management Relations Act. (29 U.S.C. § 185 (1964).)

The Board contends, however, that the policy considerations upon which *Wiley* is based support its action in this case. But the policy behind the decision in *Wiley* was founded upon the Court's recognition of "the central role of arbitration in effectuating national labor policy." *Id.* at 549.[3] The Court's determination

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[3] The Court repeatedly emphasized this basis for its decision and the limited effect of its holding:

> "Here, the question is whether Wiley, which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, is bound at all *by the agreement's arbitration provision.*
>
> . . .

is only that "the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed." *Id.* at 550 (footnote omitted).

Although it is true that a rule such as that promulgated by the Board would put future potential successor employers on notice that existing contracts would be obligatory on them and thus provide them with a choice of action, the rule would bind the union to a contract with a successor employer without giving it any opportunity for choice. This could sometimes result in serious inequities. For example, where a union made substantial concessions to a failing employer in order to keep him in business and then discovered that the successor was a strong, financially viable organization, it would have no chance to bargain anew. The Board's holding that it will consider "unusual circumstances" (see, e.g., *Emerald Maintenance, Inc.*, 188 N.L.R.B. No. 139 (1971) where the Board, citing "unusual circumstances," refused to apply the rule it had earlier laid down in *Burns*) is no answer since it merely arrogates to the Board the additional power to pick and choose among the contractual provisions it will impose on non-contracting parties.

We refuse enforcement to that portion of the Board's order that requires Burns to honor the terms of the collective agreement between the union and Wackenhut.

. . . It would derogate from *'the federal policy of settling labor disputes by arbitration,'* . . . if a change in the corporate structure and ownership of a business enterprise had the automatic consequence of *removing a duty to arbitrate* previously established." *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 547, 549 (1964) (citation omitted) (emphasis added).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 34889, 35055

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162, INTERVENOR

JUDGMENT

Before: Hays and Feinberg, Circuit Judges, and Curtin, District Judge.*

THIS CAUSE came on to be heard upon a petition to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board dated May 7, 1970, against the above-named Petitioner, its officers, agents, successors and assigns. The Court heard argument of respective counsel on March 8, 1971, and has considered the briefs and transcript of record filed in this cause. On April 26, 1971, the Court being fully advised in the premises handed down its opinion granting in part and denying in part enforcement of the Board's said order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that The William J. Burns International Detective Agency, Inc., its officers, agents, successors and assigns, shall:

* Of the United States District Court for the Western District of New York, sitting by designation.

1. Cease and desist from:

(a) Refusing to bargain collectively, upon request, with International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 (the "Union") as the exclusive bargaining representative of all of its employees in the following collective bargaining unit: all full-time and regular part-time employees performing plant protection services, as determined by Section 9(b)(3) of the National Labor Relations Act, as amended, at Lockheed, Ontario International Airport; excluding office clerical employees, supervisors, and all other employees as defined in the Act.

(b) Assisting or recognizing the American Federation of Guards (the "AFG") as the representative of its employees in the above-described unit for the purposes of collective bargaining, unless and until said labor organization shall have been certified as the exclusive bargaining representative of said employees in the above-described unit.

(c) Interfering with representation of its employees through labor organizations of their own choosing.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to join or assist the Union.

2. Take the following affirmative action:

(a) Withdraw and withhold recognition from AFG as representative of its employees in the above-described unit.

(b) Bargain collectively, upon request, with the Union, with respect to its employees in the above-described unit, and, if any understanding is reached, embody such understanding in a signed agreement.

(c) Post at its Lockheed, Ontario, California, operations, copies of the notice attached hereto as "Appendix." Copies of said notice, to be furnished by the Regional Director for Region 31 (Los Angeles, California) shall, after being signed by Petitioner's authorized representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by any other material.

(d) Notify said Regional Director, in writing, within 10 days from the date of this Judgment what steps Petitioner has taken to comply herewith.

PAUL R. HAYS
Judge, United States Court of Appeals for the Second Circuit

WILFRED FEINBERG
Judge, United States Court of Appeals for the Second Circuit

Filed: May 18, 1971

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Judgment of the United States Court of Appeals enforcing in part an order of the

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT
(as amended)

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively, upon request, with International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 as the exclusive bargaining representative of our employees in the following appropriate unit:

> All our full-time and regular part-time employees performing plant protection duties as determined by Section 9(b)(3) of the National Labor Relations Act, at Lockheed, Ontario International Airport; excluding office clerical employees, supervisors, and all other employees as defined in the Act.

WE WILL NOT assist or recognize American Federation of Guards, Local 1, as the representative of our employees for the purposes of collective bargaining, unless and until it shall have been certified as the exclusive bargaining representative of our employees in the above unit.

WE WILL NOT interfere with representation of of our employees through labor organizations of their own choosing.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights to join or assist the United Plant Guard Workers or otherwise engage in activities protected by the Act.

WE WILL withdraw and withhold recognition from American Federation of Guards as representative of employees in the above unit until or unless it is certified as bargaining representative of our employees in said unit.

WE WILL bargain, upon request, with United Plant Guard Workers with respect to employees in the above unit, and, if any understanding is reached, embody such understanding in a signed agreement.

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.
(Employer)

Dated ..... By .....

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Bldg., Room 12100, 11000 Wilshire Blvd., Los Angeles, California, 90024, Telephone No. 824-7351.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 34,889, 35,055

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

etc.

It is hereby ordered that the motion made by counsel for the respondent, National Labor Relations Board, to vacate the judgment filed herein on May 18, 1971 and file in lieu thereof the Board's second proposed judgment, be and it hereby is granted to the extent of adding the following paragraph to the judgment of May 18, 1971, denominated as paragraph 2(c):

> (c) Make whole all persons employed in the above described unit for any loss of pay or other benefits they may have suffered as a result of unilateral changes in working conditions, reimbursement to be made in accordance with *F. W. Woolworth Co.*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Paragraphs denominated 2(c) and 2(d) in the original judgment filed May 18, 1971 are now denominated 2(d) and 2(e), respectively. By this action we reverse our order of June 30, 1971, which

denied the same motion made by the respondent, National Labor Relations Board.

/s/ Paul R. Hays
(PAUL R. HAYS)

/s/ Wilfred Feinberg
(WILFRED FEINBERG)
U.S.C.JJ.

/s/ John T. Curtin
(JOHN T. CURTIN)
U.S.D.J.

Dated: July 12, 1971

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 31-CA-776

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.

and

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162

and

AMERICAN FEDERATION OF GUARDS, LOCAL 1, PARTY IN INTEREST

DECISION AND ORDER

On June 4, 1968, Trial Examiner E. Don Wilson issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in certain other unfair labor practices. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief, and the Charging Party (herein referred to as the Union) and General Counsel filed briefs in support of the Trial Examiner's Decision.

On January 31, 1969, the National Labor Relations Board, having determined that the instant case raised issues of substantial importance in the administration of the National Labor Relations Act, as

amended, ordered that this case be consolidated with three others [1] for the purpose of oral argument before the Board on March 12, 1969. The parties were given permission to file further briefs. Subsequently, on February 19, 1969, the Board extended the date of the oral argument to April 23, 1969.

The Board also invited certain interested parties to file briefs *amici curiae* and to participate in oral argument. Briefs were filed by: The Chamber of Commerce of the United States; American Federation of Labor and Congress of Industrial Organizations; International Union, United Automobile, Aerospace and Agricultural Implement Workers; The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America; and the National Federation of Independent Unions. The Chamber of Commerce of the United States, The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and the National Federation of Independent Unions did not choose to participate in the argument. The National Association of Manufacturers declined to either file a brief or participate in the argument.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, the oral arguments, Respondent's motions to reopen the record and the General Counsel's and Charging Party's opposition thereto, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

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[1] *Travelodge Corp. et al.*, Case 21-CA-7694; *Hackney Iron & Steel Co.*, Cases 23-CA-2505, 23-CA-2554; *Kota Division of Dura Corporation*, 18-CA-2419.

Briefly, the facts show that Wackenhut performed plant protection services for Lockheed Aircraft Service Company, Ontario International Airport, Ontario, California. On March 8, 1967,[2] the Union was certified as exclusive bargaining representative for all of Wackenhut's full-time and regular part-time plant protection employees. On April 29, Wackenhut and the Union entered into a collective-bargaining agreement effective until April 28, 1970.

Pursuant to its agreement with Wackenhut, Lockheed let the service contract out for bids. On May 15, at a prebid conference attended by several general service contractors including the Respondent, Burns, Lockheed advised the prospective bidders that Wackenhut's guards were represented by the Union which had a recent Board Certification, and that there was in existence a labor contract between Wackenhut and the Union covering these employees. On May 31, Wackenhut was informed by Lockheed that Respondent would perform the guard services as of July 1.

Prior to its July 1 takeover, Respondent interviewed guards for employment who were at that time employed by Wackenhut. As more fully described by the Trial Examiner, the Respondent assisted the American Federation of Guards in the solicitation of employees Elmer Reitzel, Thomas Ware, Charles Blenkemeier, Harris Camp, Stanley Ganiewski, and Walter Drake. On June 29, Respondent recognized the American Federation of Guards as bargaining representative.

On July 1, when Respondent officially began the guard service duties theretofore performed by Wackenhut, some 27 guards formerly worked at Lockheed in the employ of Wackenhut began work as guard em-

[2] Hereinafter, all dates refer to 1967 unless otherwise stated.

ployees of Respondent. In addition, 15 employees of Respondent were transferred from other jobs and began work at Lockheed. Thus, in assuming guard functions at Lockheed, a majority of Respondent's work force was made up of ex-Wackenhut employees, and the nature of the business remained the same.

On July 12, the Union, by letter, made a demand upon Respondent that it recognize the Union as bargaining representative and honor the Union's collective-bargaining agreement with Wackenhut. By letter dated July 24, the Respondent declined recognition. Unfair labor practice charges were then filed which resulted in the issuance of the complaint in the instant proceeding.

The Trial Examiner concluded that Respondent violated Section 8(a)(2) and (1) of the National Labor Relations Act, as amended, by assisting the American Federation of Guards in organizing employees, and by recognizing the American Federation of Guards when it did not represent an uncoerced majority of Respondent's employees. In addition, the Trial Examiner found that Respondent was a successor employer to Wackenhut and that it violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the bargaining representative of its employees. We agree with these findings of the Trial Examiner.

We also agree with the Trial Examiner that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to abide by the 1967 contract between Wackenhut and the Union. However, in view of the significance of the issue presented, we believe it is necessary to explicate fully our reasons for doing so.

The Supreme Court's Decision in *John Wiley & Sons* v. *Livingston*[3] altered the perspective in which

[3] 376 U.S. 543.

a successor employer's obligations to honor the provisions of a collective-bargaining agreement negotiated by his predecessor must be viewed. There, the predecessor employer was absorbed by merger into a larger acquiring company (Wiley). Some of the predecessor's employees were represented by a union, and the collective-bargaining contract, which did not contain a successors clause, was not scheduled to expire until over a year after the merger took place. Pursuant to an arbitation clause in the contract, the union brought suit to compel Wiley to arbitrate its claim that certain contract rights had survived the merger. The Court held that even though the predecessor had disappeared as a result of the merger, all rights of the employees covered by the preexisting collective-bargaining agreement did not terminate. The Court determined that under the circumstances presented Wiley was bound to arbitrate its obligations under the preexisting collective-bargaining agreement.

In reaching its conclusion, the Court specifically rejected the contention that Wiley could not be required to arbitrate under the preexisting collective-bargaining agreement because it was not a party to that agreement and had not consented to be bound by it. The Court stated at 376 U.S., 550:

> While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, (footnote omitted), a collective bargaining agreement is not an ordinary contract . . . '[I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . The collective bargaining agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particu-

> lar industry or of a particular plant.' (Citation omitted) . . . Central to the peculiar status and functions of a collective bargaining agreement is the fact dictated both by circumstances . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship.

As the foregoing indicates, the Supreme Court refused to rely upon common law contract doctrine in determining the nature of a purchasing-employer's obligation to arbitrate matters arising under a contract it had not signed. Rather, the Court construed the contract in the context of a national labor policy which accords a central role to arbitration as "the substitute for industrial strife" and as "part and parcel of collective bargaining itself" and found the necessary contractual foundation for the duty to arbitrate in the contract negotiated by Wiley's predecessor:

> "Therefore, although the duty to arbitrate, as we have said . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy." (376 U.S. 551).

The concept of substantial continuity in the employing industry enunciated as a necessary condition

for the survival of the duty to arbitrate when the ownership of a business changes hands is at the heart of our determination that a purchasing employer is a successor-employer within the meaning of the Act. In essence, the finding of successorship involves a judgment that the employing industry has remained essentially the same despite the change in ownership.[4] A normal consequence of such finding is that the successor employer is obligated to recognize and bargain with the union duly selected by the employees—albeit prior to the change in ownership—as their collective-bargaining representative. This consequence of successorship is rooted, *inter alia*, in the fact that

> "[i]t is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace . . . . ,"[5]

as well as in the fact that, having chosen a bargaining representative,

> "[t]here is no reason to believe that the employees will change their attitudes merely because the identity of their employer has changed."[6]

Binding the successor-employer to his predecessor's bargaining obligation furthers the policy of protecting the employees' exercise of the right to engage in collective bargaining through representatives of their own choosing. Requiring the successor-employer to negotiate proposed changes in existing terms and conditions of employment with the employees' bargaining representative promotes stability in the employing

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[4] See, e.g., *Cruse Motors, Inc.*, 105 NLRB 242, 247.

[5] *Kiddie Kover Co.* v. *N.L.R.B.*, 105 F.2d 179, 188 (C.A. 6).

[6] *N.L.R.B.* v. *Albert Armato*, 199 F.2d 800, 803 (C.A. 7).

enterprise's labor relations and furthers the interests of industrial peace. The obligation to bargain imposed on a successor-employer includes the negative injunction to refrain from unilaterally changing wages and other benefits established by a prior collective-bargaining agreement even though that agreement has expired.[7] In this respect, the successor-employer's obligations are the same as those imposed upon employers generally during the period between collective-bargaining agreements.[8]

The question before us thus narrows to whether the national labor policy embodied in the Act requires the successor-employer to take over and honor a collective-bargaining agreement negotiated on behalf of the employing enterprise by the predecessor. We hold that, absent unusual circumstances, the Act imposes such an obligation.

"The history of the collective bargaining process demonstrates that its object has long been an agreement between employer and employees as to wages, hours and working conditions evidenced by a signed contract or statement in writing, which serves both as recognition of the union with which the agreement has been reached and as a permanent memorial of its terms . . . . [t]he signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife." (*Heinz Co.* v. *N.L.R.B.*, 311 U.S. 514). In enacting the 1947 amendments to the Act, Congress added Section 8(d) in which it

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[7] *Harold W. Hinson, d/b/a Hen House Market No. 3*, 175 NLRB No. 100, enforced, F.2d (C.A. 8) (1970). *Overnite Transportation Co.*, 157 NLRB 1185, enfd. 375 F.2d 765 (C.A. 4), cert. denied, 398 U.S. 838.

[8] *Marine & Shipbuilding Workers* v. *N.L.R.B.*, 320 F.2d 615 (C.A. 3).

defined in some detail the duty to bargain collectively, including within that definition a specific ratification of the holding in the *Heinz* case.

Section 8(d) also defined the duty to bargain as meaning that, "where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce . . . no party to such contract shall terminate or modify such contract", unless it serves prescribed notices on the other party, and maintains its contract in effect for 60 days therefrom, even though that period may extend beyond the contract's natural termination or expiration date. Section 8(d) also provides that a party to a collective-bargaining agreement has the right to refrain from discussing modifications which are to take effect prior to the period fixed by the contract itself for reopening negotiations. Section 8(d) thus clearly demonstrates Congress' recognition of the paramount role in maintaining industrial peace played by parties' adherence to existing collective-bargaining agreements.

The impressive policy considerations favoring the maintenance and adherence to existing collective-bargaining agreements are not wholly overborne by the fact that Burns has not signed the contract here in issue. Nor can a holding that Burns is obligated to honor and adhere to the express terms of the contract readily be equated with compelling Burns to agree to a bargaining proposal or make a concession it is unwilling to make.[9] Indisputably, there is a contract. That contract covers the employees of the employing industry which Burns took over; it was negotiated on

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[9] Section 8(d) provides that performance of the mutual obligation to bargain does not compel either party to agree to a proposal or require the making of a concession.

behalf of the employing enterprise by Wackenhut, Burns predecessor. That contract is reasonably related to Burns through its takeover of Wackenhut's Lockheed service functions and its hiring of Wackenhut employees. We find, therefore, that Burns is bound to that contract as if it were a signatory thereto, and that its failure to maintain the contract in effect is violative of Sections 8(d) and 8(a)(5) of the Act.[10]

In the normal case, we perceive no real inequity in requiring a "successor-employer" to take over his predecessor's collective-bargaining agreement, for he stands in the shoes of his predecessor. He can make whatever adjustments the acceptance of such obligation may dictate in his negotiations concerning the takeover of the business. Normally, employees cannot make a comparable adjustment. Their basic security is the collective-bargaining agreement negotiated on their behalf. In the instant case this is certainly so. They work in an industry in which the identity of their employer is subject to annual bidding for the right to perform the services they are engaged in furnishing. The contract involved herein was negotiated for a term of 3 years, but had been in existence for only 2 months at the time of Burns' takeover. Burns had knowledge of the agreement when it bid for the Lockheed service contract. It hired employees on whose behalf the agreement was negotiated. Accordingly, in order to fully protect the employees' exercise of the right to bargain collectively and to promote the maintenance of stable bargaining

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[10] *C & S Industries, Inc.*, 158 NLRB 454; *N.L.R.B.* v. *Huttig Sash & Door Co.*, 377 F.2d 964 (C.A. 8), enforcing 154 NLRB 811. See also, *Oilfield Maintenance Co., Inc., etc.*, 142 NLRB 1384.

relationships and concomitantly industrial peace in this industry, we conclude that Respondent Burns must be held bound to its predecessor's contract.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, The William J. Burns International Detective Agency, Inc., Ontario, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, with the qualification described below.[11]

Dated, Washington, D. C.

FRANK W. MCCULLOCH, Chairman

JOHN H. FANNING, Member

GERALD A. BROWN, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

[11] Substitute "Judgment" for "Decree" wherever it occurs in footnote 6 of the Trial Examiner's Recommended Order.

Member Jenkins, dissenting:

My partial dissent is as follows:

There is no requirement in the Act that a successor employer be bound by the collective bargaining agreement in effect when the business is transferred. Whether to require the successor to be bound is therefore a matter of judgment or interpretation of the national labor policy. In the absence of a clear statutory command or binding judicial precedent, I would not impose the existing agreement on either the union or the employer.

Where the enterprise is marginal or faltering, the new management may have to rearrange the terms and conditions of employment if the business and the jobs are to survive. The union also may, as in the companion case of *Kota Division of Dura Corporation*, 182 NLRB No. 51, want the opportunity to alter employment conditions in the light of the new economic circumstances and relations brought into the situation by the new employer. In such cases, our goal should be to permit the parties flexibility in working out their new arrangements if either desires to do so, rather than to impose the existing agreement when one side may be seriously dissatisfied with it. The new employer is not a party to the agreement, and the union did not join in shaping and executing it with his circumstances in mind. Thus, to impose the agreement on the new relation may in many cases prove a source of friction and disruption, rather than the stability for which my colleagues hope.

Section 8(d) of the Act, in requiring "parties" to adhere to their agreements and give notice of termination well in advance, hardly supports the conclusion that the successor is bound by the agreement;

for that section refers only to a "party" to the contract, the successor is not a party, and the issue before us is whether he should be treated as if he were a party.

Unlike my colleagues, who rely principally on *John Wiley and Sons* v. *Livingston* to require that the existing agreement must continue in effect beyond the transfer of the business, I see little in that case to support that conclusion. The employees' rights at issue there were of a very narrow range, such as seniority, vacation pay, pension contributions and severance pay, rights which were fixed or already accrued by being, at least in part, earned through past performance of work, or "vested" as the Court referred to them. The Court held only that the arbitration clause in the old agreement survived the merger as an available method of resolving issues concerning these "vested" rights. This hardly amounts to a holding that the entire old agreement must be imposed on the new employment relation. Indeed, the Court's approval of arbitration and its inherent flexibility and adjustment to unforeseen circumstances might indicate that the old agreement should not be so imposed.

Accordingly, I would not hold that Burns is bound by the agreement between its predecessor, Wackenhut, and Lockheed.

Dated, Washington, D. C.

HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS
BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case No. 31-CA-776

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.

and

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162

and

AMERICAN FEDERATION OF GUARDS, LOCAL 1, PARTY IN INTEREST

Gerald Goldman and *Clifford L. Hardy, Esqs.*, of Los Angeles, Calif., for the General Counsel.

O'Melveny & Myers, by *Charles G. Bakaly, Jr.* and *Seymour Swerdlow, Esqs.*, of Los Angeles, Calif., for the Respondent.

Livingston, Gregory, Van Lopik & Higle, by *Gordon A. Gregory, Esq.*, of Detroit, Mich., for the Charging Party.

TRIAL EXAMINER'S DECISION

Statement of the Case

E. DON WILSON, Trial Examiner: The original charge was filed on July 24, 1967, by International

Union, United Plant Guard Workers of America and its Amalgamated Local Union, No. 162, herein the Union, and an amended charge was filed on August 1, 1967. Upon the charge as amended, the General Counsel of the National Labor Relations Board, herein the Board, issued a complaint and notice of hearing dated October 25, 1967, alleging that The William J. Burns International Detective Agency, Inc., herein Respondent, had violated Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act, herein the Act.

Pursuant to due notice, a hearing in this matter was held before me in Los Angeles, California, on December 19 and 20, 1967. All parties but the party in interest fully participated. Briefs for the General Counsel, Respondent, and Charging Party have been received and considered.

Upon the entire record[1] in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. Respondent's Business

At all material times, Respondent has been a New York corporation with offices in various parts of the United States, including an office at Los Angeles, California, where it is engaged in providing protective, guard, and detective services to business firms throughout the United States.

In the course and conduct of its business operations, Respondent's Los Angeles office has an annual volume of business in excess of $500,000, and annually performs services valued in excess of $50,000 for

[1] The motion to correct the transcript is granted as is the motion to admit Respondent's Exhibit No. 5 into evidence.

firms outside the State of California, and annually performs services valued in excess of $50,000 for firms in the Los Angeles area, each of which ships products valued in excess of $50,000 directly outside the State of California.

The Wackenhut Corporation, herein Wackenhut, is a Florida corporation engaged in plant protection and security services for firms located throughout the United States. In the course and conduct of its business operations, Wackenhut has an annual gross volume of business in excess of $500,000, and it annually performs services valued in excess of $50,000 outside Florida.

Respondent and Wackenhut, each, is and at all material times has been, an employer engaged in commerce within the meaning of the Act.

II. The Labor Organizations

The Union and American Federation of Guards, Local 1, herein AFG, are labor organizations within the meaning of the Act.

III. The Unfair Labor Practices

A. *The Issues*

The issues include the following:

(1) Is Respondent a successor to Wackenhut;

(2) Is a unit limited to employees of Respondent at Lockheed, appropriate;

(3) Has Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and by refusing to give effect to a contract between Wackenhut and the Union;

(4) Has Respondent violated Section 8(a)(2) and (1) of the Act by recognizing AFG as the

bargaining representative of Respondent's employees at Lockheed and by requiring membership in or an application for membership in AFG as a condition of employment at Lockheed;

(5) Did Respondent violate Section 8(a)(1) and (2) of the Act by promising and giving an employee a promotion and a raise because he assisted the AFG; and

(6) Did Respondent violate Section 8(a)(2) and (1) of the Act by assisting AFG in organizing Respondent's employees and by recognizing AFG when AFG did not represent an uncoerced majority of Respondent's employees?

B. *Respondent, Wackenhut and the Appropriate Unit*

At least beginning February 28, 1967,[2] Wackenhut performed plant protection services for Lockheed Aircraft Service Company, herein Lockheed, at Ontario International Airport. On this date, a majority of the employees in the following unit selected the Union as their bargaining representative in a Board election. The unit is:

> All full-time and regular part-time employees of Wackenhut performing plant protection duties as determined in Section 9(b)(3) of the Act at Lockheed, Ontario International Airport; excluding office clerical employees, professional employees, supervisors, and all other employees as defined in the Act.

On March 8, the Regional Director certified the Union as the exclusive bargaining representative of the employees in the above unit.

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[2] Hereinafter all dates refer to 1967 unless otherwise stated.

On April 29, Wackenhut entered into a collective-bargaining contract with the Union to be effective until April 28, 1970. It contained a legal union security provision.

As provided by the agreement between Lockheed and Wackenhut, Lockheed let the service contract out for bids. On May 15, Lockheed advised Respondent that Wackenhut's guards were represented by the Union which had a contract after Board certification. On May 31, Wackenhut was told by Lockheed that Respondent would perform the guard services as of July 1. Wackenhut ceased performing the guard services and Respondent began performing the guard services for Lockheed. On July 1, Respondent's employees included 27 guards formerly employed by Wackenhut and 15 transferred employees of Respondent.

C. *Respondent Assists the AFG*

1. Reitzel

Elmer H. Reitzel was formerly an employee of Wackenhut. He was "Chairman of the Board" of the Wackenhut employees. About June 2, Major George Goddard, a supervisor of Respondent, interviewed Reitzel and gave him a job application. A few days later, Reitzel spoke to Mr. New, Respondent's Operations Manager, and a supervisor, about the job. New told Reitzel to see Jack Foley, an organizer for the AFG. Foley was seated from 15 to 30 feet away from New, in the same room. Foley gave Reitzel an AFG authorization card to sign and said employees had to belong to the AFG to work for Respondent, but Reitzel did not then sign it. Foley said Respondent couldn't live with the Union's contract. Reitzel asked for a copy of the AFG contract but did not get one.

Foley told Reitzel that as steward he would like to have him get the employees to sign authorization cards for the AFG. Reitzel said he'd talk to the employees. Reitzel left and then called a representative of the Union in Detroit. Reitzel told the representative Respondent and AFG wanted the employees to sign authorization cards to keep their jobs. The representative said it was all right if it meant their jobs. Foley mailed pledge cards to Reitzel. About 2 days later, Foley came to Reitzel and spoke to him about the cards. I have carefully studied Reitzel's testimony and find it is confused as to dates. I am convinced that Reitzel just did not remember when Goddard told Reitzel Respondent was considering promoting him to sergeant. Foley asked Reitzel if he had gotten authorization cards, which Foley had given him, signed. Reitzel said he was working on them. In the latter part of June, Goddard phoned Reitzel and asked him to bring the signed pledge cards to Respondent's office. Reitzel failed to do so. About 10 o'clock that evening, Captain Kretzlow, a supervisor, came to Reitzel's home and asked for the signed AFG cards and Reitzel explained that he didn't have them with him. The next morning at work, Goddard came to Reitzel and picked up the AFG cards.[3]

When Respondent took over Wackenhut's operations, Reitzel was promoted from guard to sergeant with a raise from $1.75 to $1.95 an hour with no additional obligations. There is insufficient probative evidence that Reitzel was promised the promotion or was promoted to sergeant in violation of Section 8(a)(1) or (2) of the Act. Reitzel's recollection of when he was told he would be promoted to sergeant is too confused to permit a finding.

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[3] The record makes clear there were about 18.

Respondent violated Section 8(a)(2) and (1) of the Act by New's direction to Reitzel to see Foley who as part of the hiring procedure told Reitzel he had to sign an AFG pledge card to work for Respondent and asked him to get other employees to sign for the AFG. Respondent similarly violated the Act by Goddard's request of Reitzel that he bring the signed AFG cards to Respondent's office and by Kretzlow's asking for the cards and by Goddard picking them up from Reitzel at work.

2. Thomas C. Ware

Ware was employed by Wackenhut as a guard. In early June, he went to Respondent's office with a filled out application for employment by Respondent. He gave his application to New. He told New he would like to know about pay and about hospitalization and other details. New directed him to Foley for answers. He saw Foley in the same room. Foley gave him no answers. Foley repeatedly pushed an AFG authorization card in front of Ware and told him the Union was out and that he had to sign the AFG card or not work for Respondent. Ware said that "in California" he had 30 days to make up his mind.

I find Respondent violated Section 8(a)(2) and (1) of the Act by New's assisting Foley in his solicitation for the AFG, of Ware.

3. Charles A. Blankemeier

On June 28, Blankemeier received an application for employment. The next day he returned the application when he went to Respondent's office to pick up a uniform. He saw Goddard and Kretzlow and asked for his uniform. As he was preparing to leave with

his new uniform, Goddard told him he had to sign an AFG authorization slip before he could have Respondent's uniform. He signed the AFG slip with Foley's name on it and left with the uniform.

I find Respondent violated Section 8(a)(2) and (1) of the Act by conditioning his receipt of Respondent's uniform, necessary for work with respondent, on his signing an AFG authorization card.

4. Harris K. Camp

About June 10, Camp went to Respondent's office for an application. He saw Goddard. Goddard told him to go into the next room. Camp did so and found Foley to be the only one there. Foley told him Respondent now had the contract and if Camp wanted to work for Respondent he would have to sign the AFG card. Foley handed him a card and Camp said he would think it over. He left and again saw Goddard who gave him a work application. The next day Camp brought this application back to Goddard. He was measured for Respondent's uniform. A couple of weeks later, on June 30, he went in to pick up his uniform and on top of it was an AFG union slip that was supposed to be signed by him. In the presence of Goddard, Kretzlow gave him the AFG slip to sign. He said it had to be signed. It was in with the paper work for the clothing.

I find Respondent, through Goddard and Kretzlow, assisted the AFG in signing up Camp, in violation of Section 8(a)(2) and (1) of the Act.

5. Stanley L. Ganiewski

Ganiewski was a Wackenhut guard who went to Respondent's office for employment about June 10. He saw Goddard and asked where the applications were. Goddard pointed to a room. Ganiewski went there

and found Foley there alone. Foley told him he'd have to join the AFG to work for Respondent. Foley spoke at length about the AFG and its contract. He asked Ganiewski to sign an AFG authorization card. The latter said he'd think about it and left.

I find Respondent, through Goddard, assisted the AFG in its solicitation of Ganiewski through Foley, in violation of Section 8(a)(2) and (1) of the Act.

6. Walter Drake

In the latter part of June, Drake went to Respondent's office and talked to Goddard and some captain. The captain brought to him an authorization card of the AFG and said he would have to sign it before he could go to work. He said it was for "their union." Drake said he had 30 days to sign the card. They said he would have to sign it before he could go to work. Later that day, Goddard told him he had 30 days to sign but Respondent would like to have the AFG authorization signed before he went to work. Drake signed the card.

Respondent, through Goddard and the captain, assisted the AFG in its organizing activities in connection with Drake and thereby violated Section 8(a)(2) and (1) of the Act.

C. *Respondent is a Successor to Wackenhut and Obligated to Bargain With the Union*

When Respondent began its operations at Lockheed during the certification year, and during the contract term, it performed the same operations at Lockheed as had Wackenhut. It had in its employ a majority of Wackenhut's former employees. There has been a substantial continuity of Wackenhut's business operations by Respondent. At least substantially

the same business facilities have been used. The working conditions are substantially the same. The services provided are substantially the same. Respondent's taking over Wackenhut's operations at Lockheed constituted no change in the "employing industry forming the appropriate bargaining unit for which the Union had been certified." *Maintenance, Incorporated*, 148 NLRB 1299. As in *Maintenance*, "Respondent commenced the performance of substantially the identical operations that had theretofore been performed by [Wackenhut], servicing the same facilities for the same customers in substantially the same manner and at the same work site, and utilizing for that purpose a former [Wackenhut] work force to perform the same functions and exercise the same skills."

Respondent had the duty to honor its employees' choice of a bargaining representative, the Union. This was a public obligation not arising from private contract. The Union "was entitled to statutory recognition at the time Respondent took over." *Maintenance, Incorporated, supra.*

It is clear "that Respondent assumed the obligation the Act imposes upon an employer to recognize and deal with its employees' majority representative when it selected as its work force the employees of the previous employer to perform the same tasks at the same place as they had in the past. These employees had already expressed their choice of bargaining representative, and continued to constitute an appropriate bargaining unit. As the certification year had not yet expired at the time the Union sought recognition and bargaining,[4] the presumption of the Union's continuing majority status applied and was not then vulnerable to attack." *Maintenance, Incor-*

[4] July 12.

porated, supra. Respondent was obligated to recognize and bargain with the Union as the statutory representative of its employees in an appropriate unit. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to comply with the Union's July 12 demand for bargaining. It has been found that Respondent knew, when it bid for the Lockheed contract, that the Union was the certified bargaining representative.

Respondent challenges the appropriateness of the bargaining unit as applied to Wackenhut and as applied to Respondent. While a broader unit might have been appropriate, I find a unit of guards limited to a single facility is an appropriate unit. Here the certification was pursuant to a consent election agreement. There is no evidence that the Regional Director was arbitrary or capricious. A mere change of employers does not destroy the certification.

D. *Respondent Violated Section 8(a)(2) and (1) By Recognizing the AFG*

As has heretofore been found, the AFG did not represent an uncoerced majority of Respondent's employees on or before July 1, when Respondent recognized the AFG. Consequently, Respondent assisted AFG in violation of Section 8(a)(2) and (1) of the Act when it recognized the AFG as bargaining representative.

E. *Respondent Violated Section 8(a)(5) and (1) of the Act By not Honoring and Assuming and Doing Business Under the Contract Between the Union and Respondent's Predecessor, Wackenhut*

On April 29, the Union and Wackenhut entered into a collective-bargaining agreement covering Wack-

enhut's Lockheed employees, the contract to be effective until 1970.

While *Wiley* v. *Livingston*, 376 U.S. 543, dealt specifically only with the obligation of a successor employer to arbitrate under a contract with a union, the decision made clear that the rights of employees under a collective-bargaining agreement are not automatically terminated by the fact that one employer succeeds to the rights of another employer. The Court was concerned with whether, as here, the business remains the same. The Court recognized that employees do not ordinarily take part in negotiations, leading to changes in corporate ownership. The well being of employees is at best incidental to the negotiations. The Court held, "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." The Court emphasized that a collective-bargaining agreement is not an ordinary contract.

The Union persuasively argues that in an industry of the nature here involved where the employer may be changed from year to year, the union contract should follow the unit rather than the employer. The employees may select a union which obtains a contract for their benefit and find the employer changes. If the new employer may ignore the contract, all negotiations for peaceful contractual relations come to naught. Here, if Respondent does not assume and honor the contract, economic stability is destroyed. To leave Respondent free to bargain from scratch and ignore the common law of the employing industry is to leave an industry such as this to contracts of no substance or meaning.

The *Wiley* reasoning has been applied in a situation very similar to the instant case. *Wackenhut Corporation* v. *International Union, United Plant Guard Workers of America*, 332 F.2d 954 (C.A. 9). There the court found that where, as here, there is a "substantial similarity of operation and continuity of identity of the business enterprise before and after the change in ownership," the successor employer is bound by the entire contract of the predecessor.

I find that Respondent by refusing to honor the contract between Wackenhut and the Union, refused to bargain in violation of Section 8(a)(5) and (1) of the Act since on or about July 24.[5]

IV. The Effect of the Unfair Labor Practices

The activities of Respondent set forth in section III, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States, leading to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

Upon the foregoing findings of fact and the entire record in the case, I make the following conclusions of law:

1. Respondent and Wackenhut are employers engaged in commerce within the meaning of the Act.
2. AFG and the Union are labor organizations within the meaning of the Act.
3. All full-time and regular part-time employees of Respondent performing plant protection duties as determined in Section 9(b)(3) of the Act at Lockheed, Ontario International Airport; excluding office

[5] Cf. *Michaud Bus Lines, Inc.*, 171 NLRB No. 21.

clerical employees, professional employees, supervisors, and all other employees as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. By failing and refusing on July 24, and thereafter, to recognize and bargain with the Union as the exclusive bargaining representative of Respondent's employees in the above-described appropriate unit and by failing to honor and adopt and enforce the existing contract between Wackenhut and the Union, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. By assisting AFG in obtaining representation among its employees and by recognizing AFG as the exclusive bargaining representative of its employees at a time when AFG did not represent an uncoerced majority of Respondent's employees, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (2) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1), (2), and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent be ordered to withdraw and withhold recognition from AFG unless and until that union is certified, in order to enable its employees to exercise their statutory rights free

from the unfair labor practices engaged in by Respondent.

It has been found that the Union is the certified bargaining representative of Respondent's employees in an appropriate unit and requested recognition and bargaining, the same being unlawfully refused, I shall recommend that Respondent bargain, upon request, with the Union and, if any understanding is reached, embody such understanding in a signed agreement. It has further been found that there is in existence a contract between Respondent, as successor to Wackenhut, and the Union. I shall recommend that Respondent honor, adopt and enforce that contract. I shall also recommend that Respondent give retroactive effect to all the clauses of the contract and make whole, with 6 percent interest, employees for any losses suffered by reason of Respondent's refusal to adopt, honor and enforce the agreement.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record herein, it is recommended that Respondent, its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively, upon request, with the Union as the exclusive bargaining representative of its employees in the above-described unit.

(b) Refusing to adopt, honor and enforce its contract with the Union, as successor of Wackenhut.

(c) Assisting or recognizing AFG as the representative of its employees for the purposes of collective bargaining, unless and until said labor organiza-

tion shall have been certified as the exclusive bargaining representative of said employees in an appropriate unit.

(d) Interfering with representation of its employees through labor organizations of their own choosing.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to join or assist the Union or otherwise engage in activities protected by the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Withdraw and withhold recognition from AFG until or unless it is certified as bargaining representative of Respondent's employees in an appropriate unit.

(b) Bargain collectively, upon request, with the Union and, if any understanding is reached, embody such understanding in a signed agreement.

(c) Honor, adopt and enforce the contract between Respondent, as successor to Wackenhut, and the Union and give retroactive effect to all the clauses of said contract and, with interest of 6 percent, make whole its employees for any losses suffered by reason of Respondent's refusal to honor, adopt and enforce said contract.

(d) Post at its Lockheed, Ontario, California, operations copies of the notice attached hereto as "Appendix."[6] Copies of said notice, to be furnished

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[6] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF

by the Regional Director for Region 31, shall after being signed by Respondent's authorized representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by any other material.

(e) Notify said Regional Director, in writing, within 20 days from the date of the receipt of this Recommended Order what steps Respondent has taken to comply herewith.[7]

Dated:

/s/ E. Don Wilson
E. DON WILSON
Trial Examiner

THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[7] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL
EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(AS AMENDED)

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively, upon request, with International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 as the exclusive bargaining representative of our employees in the following appropriate unit:

> All our full-time and regular part-time employees performing plant protection duties as determined by Section 9(b)(3) of the National Labor Relations Act, at Lockheed, Ontario International Airport; excluding office clerical employees, supervisors, and all other employees as defined in the Act.

WE WILL NOT refuse to adopt, honor and enforce our contract, as successor of Wackenhut, with the above-named Union and covering the above-described unit.

WE WILL NOT assist or recognize American Federation of Guards, Local 1, as the representative of our employees for the purposes of collective bargaining, unless and until it shall have

been certified as the exclusive bargaining representative of our employees in the above unit.

WE WILL NOT interfere with representation of our employees through labor organizations of their own choosing.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights to join or assist the United Plant Guard Workers or otherwise engage in activities protected by the Act.

WE WILL withdraw and withhold recognition from American Federation of Guards until or unless it is certified as bargaining representative of our employees in an appropriate unit.

WE WILL bargain, upon request, with United Plant Guard Workers and, if any understanding is reached, embody such understanding in a signed agreement.

WE WILL, as successor to Wackenhut, honor, adopt and enforce our collective-bargaining contract with United Plant Guard Workers and give retroactive effect to all clauses of said contract and, with interest at 6 percent, make whole our employees for any losses suffered by reason of our refusal to honor, adopt and enforce said contract.

THE WILLIAM J. BURNS
INTERNATIONAL DETECTIVE
AGENCY, INC.
(Employer)

Dated ---------- By ----------
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 10th Floor, Bartlett Building, 215 West Seventh Street, Los Angeles, California, 90014, Telephone No. 688-5850.

APPENDIX D

The relevant provisions of the Labor Management Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 141, *et seq.*) are as follows:

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

Sec. 8(a). It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

* * * * *

Sec. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall ter-

minate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) * * * shall not be construed as requiring either party to discuss or agree to any modi-

fication of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

* * * *

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * *

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * *

APPENDIX E

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH 1971 TERM

No. 368-70

[Filed June 24, 1971, United States Court of Appeals, Tenth Circuit, Howard K. Phillips, Clerk]

RANCH-WAY, INC., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT AND CROSS-PETITIONER

On Application for Enforcement of an Order of the National Labor Relations Board

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Before HILL and JONES,* Circuit Judges, and BROWN, District Judge.

Bruce W. Sattler, Denver, Colorado, for Petitioner.

Nancy M. Sherman (Arnold Ordman, General Counsel; Dominick L. Manoli, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel, and James P. Hendricks, Attorney, National Labor Relations Board, with her on the brief) for Respondent and Cross-Petitioner.

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* Of the Fifth Circuit, sitting by designation.

JONES, Circuit Judge:

Colorado Milling and Elevator Company, operated a number of mills and plants at different places for processing and selling grain and products made from grain. Among its operations was a feed mill at Fort Collins, Colorado. It decided to cease operating feed mills and employ the capital required for their operations in other phases of its business. Harold Johnson, the manager of its Fort Collins plant, learned of the intention to close that operation. Johnson undertook to find a purchaser for the mill. Ranch-Way, Inc., a conglomerate of sorts, negotiated for the plant and ultimately became the buyer of it. Johnson remained as its manager. Before the purchase was made, Ranch-Way learned that there was an overriding union contract between Colorado Milling and Elevator Company and American Federation of Grain Millers, International, AFL-CIO. There was an appendix to the contract which provided for the relations between the Union and the Company at the Fort Collins plant. Ranch-Way was told that the Union was inactive, that the members were not paying dues, and it had some report that the Union may have lost its majority of the employees.

When the sale to Ranch-Way had been made, Johnson was authorized to negotiate with employees separately with respect to wages, and these negotiations, in most instances, resulted in a lower wage scale than was provided by the contract betwen Ranch-Way's predecessor and the Union. Under Ranch-Way's operation all employees were to have a two weeks vacation rather than a measure of vacation periods by seniority as was provided by the contract. One of the contract holidays was eliminated. Other changes were put into effect with respect to working conditions.

Eighteen of the twenty-five employees covered by the Union contract were hired by Ranch-Way. The business conducted was substantially the same as it had been before the sale. Over seventy-five per cent of the former customers continued with Ranch-Way.

The Union advised Ranch-Way that it expected the Union contract to be respected and honored. Ranch-Way, through its counsel, replied that it was not bound by the contract and indicated a belief that the Union did not have a majority.

The Union brought an unfair labor practice charge. The Regional Director filed a complaint alleging that Ranch-Way had refused to bargain with the Union in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act. A hearing was held before an Examiner of the Board who decided that Ranch-Way was not bound by the contract between Colorado Milling and Elevator Company and the Union. His view was that because the contract covered many plants and over eight hundred employees it was inapplicable to the comparatively small single unit operation of Ranch-Way at Fort Collins. The Board rejected the views of its Examiner and held that Ranch-Way was the successor of Colorado Milling and Elevator Company and as such was bound by the contract with the Union. The Board ordered that Ranch-Way cease and desist from violations of the Act; that it honor, maintain and enforce the collective bargaining agreement and, upon request, bargain with the Union. The order directed that appropriate notices be posted. Ranch-Way has filed a petition asking that the Board's order be vacated. The Board has answered and seeks enforcement of its order.

No error appears in the Board's finding that there were no such differences between Colorado Milling

and Elevator Company and Ranch-Way as would render the contract inoperative as to Ranch-Way. This is particularly true since an appendix to the primary contract covers the Fort Collins operation with respect to the matters where differences of one kind or another might call for separate treatment.

Implicit in the Board's finding is a determination that Ranch-Way did not entertain a good faith doubt as to the Board's majority. The evidence on the record as a whole sustains the Board's finding.

Where there has been a lock, stock and barrel sale of a going concern, resulting in a substantial continuity of identity, the purchaser is bound by the collective bargaining provisions of an agreement between its predecessor and a union. See National Labor Relations Board v. Ideal Laundry Corporation, 10th Cir. 1970, 422 F.2d 803; National Labor Relations Board v. F. G. McFarland, 10th Cir. 1970, 306 F.2d 219.

There is no error in the Board's conclusion that Ranch-Way is a successor to the company from which it acquired the Fort Collins business. It is bound by the collective bargaining provisions of the Union contract. The order of the Board will be ENFORCED.

IN THE

Supreme Court of the United States

October Term, 1971
No. .....

71-198

BURNS INTERNATIONAL SECURITY SERVICES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA and its AMALGAMATED LOCAL UNION NO. 162,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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IN THE

Supreme Court of the United States

October Term, 1971
No. .....

BURNS INTERNATIONAL SECURITY SERVICES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, *et. al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner, Burns International Security Services, Inc., prays that a writ of certiorari issue to review a portion of the final Judgment of the United States Court of Appeals for the Second Circuit entered on April 26, 1971. Respondent, National Labor Relations Board (herein the "Board"), has filed a petition for a writ of certiorari,* which has not yet been acted upon, to review a different portion of said Judgment.

Opinions Below.

The court of appeals decision is not yet reported. The decisions of the Board and the trial examiner are reported at 182 NLRB No. 50. Copies of these de-

**NLRB v. The William J. Burns International Detective Agency, Inc.*, Docket No. 71-123 (filed July 23, 1971). After the court of appeals had rendered its decision, Petitioner changed its name to "Burns International Security Services, Inc." from "The William J. Burns International Detective Agency, Inc."

cisions appear herein as Appendices A, B and C, respectively.

Jurisdiction.

The Judgment of the court of appeals was entered on April 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) (1964). On July 17, 1971, Associate Justice John M. Harlan granted Petitioner's Motion For Extension Of Time until August 16, 1971, to file this Petition. See Appendix D attached hereto.

Questions Presented.

1. In an unfair labor practice proceeding alleging a refusal to bargain where the contention is made that the unit for bargaining is inappropriate, must either the Board, the trial examiner or the regional director articulate reasons for holding that the unit is appropriate?

2. In such a proceeding, may a sub-contractor who is awarded a contract to provide services at a facility be held to be a successor of the previous sub-contractor and required to bargain with the union representing the previous sub-contractor's employees, where: (a) there is a total absence of dealings between the two sub-contractors; (b) the previous sub-contractor's performance at the facility constitutes a small portion of its total business, the balance of which was not affected by the change of sub-contractors; (c) the performance of the contract is integrated into the new sub-contractor's previously existing business; (d) there is a change in supervision at the facility by the new sub-contractor; and (e) within six months after the awarding of the contract the previous sub-contractor's employees constitute less than a majority of employees employed at the facility?

Statutes Involved.

The relevant provisions of the Labor Management Relations Act, 1947, as amended (herein the "Act"), 29 U.S.C. Sections 151, *et seq.*, (1964) and of Administrative Procedure Act, 5 U.S.C. Section 557(c), (1966) are set forth in Appendix E.

Statement of the Case.

On March 8, 1967, following an election conducted by the Board, International Union, United Plant Guard Workers of America and its amalgamated Local Union No. 162 (herein "UPGWA") was certified as the bargaining representative of the guards employed by The Wackenhut Corporation at a facility of Lockheed Aircraft Service Company (herein the "Facility"). Lockheed is a prime Government contractor, and the Facility was used in connection with work on Government contracts. There was no hearing and the regional director made no determination regarding the appropriateness of the collective bargaining unit. Instead, the election was conducted pursuant to a Stipulation For Certification Upon Consent Election.

On April 29, 1967, Wackenhut and UPGWA entered into a collective bargaining agreement (herein the "Wackenhut agreement"), which terminated on April 28, 1970. On July 1, 1967, Petitioner replaced Wackenhut as the sub-contractor providing plant protection services at the Facility. Wackenhut's performance at the Facility had been part of its operations in California, which consisted of between 200 and 300 plant protection contracts. Petitioner did not take over Wackenhut's other contracts. There were no dealings between Petitioner and Wackenhut. All business dealings were between Petitioner and Lockheed, or

Wackenhut and Lockheed. Petitioner did not take over Wackenhut's assets, records, books, supplies or uniforms. Petitioner's performance at the Facility was integrated into the operation of its existing nationwide organization. The work at the Facility was part of Petitioner's Pacific Division, Los Angeles Branch and Ontario Sub-Office. The Ontario Sub-Office administered 30 contracts in addition to the Facility contract.

Within the Ontario Sub-Office area,* uniform policies and practices existed with respect to labor relations, personnel matters, employment and training of guards. Determinations concerning matters which were normal subjects of collective bargaining were not made at the Facility level. Guards within the Ontario Sub-Office area had the same pay scales, vacations, working conditions, fringe benefits and were subject to the same disciplinary procedures. Facility personnel did not recruit guards, prepare payroll checks, purchase uniforms and supplies, or maintain personnel records. A central radio network was used hourly by Petitioner to contact and control all of its employees in the Ontario Sub-Office area.

Except for a single job supervisor, Petitioner's guards at the Facility had common supervision with guards performing at Petitioner's other jobs in the Ontario Sub-Office area. The job supervisor had no authority with respect to the formulation of labor relations policy. He had no authority to hire, and could only terminate guards for certain specified reasons. Petitioner did not retain Wackenhut's supervisors.

It was Petitioner's practice to interchange guards, both temporarily and permanently, on a daily basis.

*As used herein the term "Ontario Sub-Office area" shall refer to the area supervised through the Ontario Sub-Office excluding Los Angeles County. Petitioner's guards in Los Angeles County were represented by the American Federation of Guards.

Such interchange had a direct impact on the composition of the work force at the Facility. Initially, Petitioner employed 42 guards at the Facility, 27 of whom were former Wackenhut guards, and 15 of whom were Petitioner's guards who had been transferred thereto from Petitioner's other jobs. Within six months after Petitioner replaced Wackenhut, former Wackenhut guards constituted less than a majority of the guards at the Facility, as a result of the transfer of guards from Petitioner's other jobs and new hires.

After July 1, 1967, UPGWA demanded that Petitioner recognize it as the exclusive representative of Petitioner's employees at the Facility, and that Petitioner honor the Wackenhut agreement. Petitioner rejected these demands. UPGWA then filed unfair labor practice charges alleging, *inter alia,* that Petitioner had violated the Act by refusing to recognize and bargain with it.

Before the court of appeals, the Board and the trial examiner, Petitioner argued that due to the nature of its operation a collective bargaining unit of Facility guards was not appropriate; and therefore, Petitioner was not obligated to recognize or bargain with UPGWA. Petitioner also argued that even if the unit was appropriate, it was not Wackenhut's successor due to the changes in the employing industry.

The Board's only finding concerning the appropriateness of the Facility unit was its *pro forma* adoption of the trial examiner's findings, conclusions and recommendations. The trial examiner had stated:

> "Respondent challenges the appropriateness of the bargaining unit as applied to Wackenhut and as applied to Respondent. While a broader unit might have been appropriate, I find a unit of

> guards limited to a single facility is an appropriate unit. Here the certification was pursuant to a consent election agreement. There is no evidence that the Regional Director was arbitrary or capricious. A mere change of employers does not destroy the certification." (A. p. 32)*

Thus, the Board and the trial examiner merely referred to the prior certification, which was by way of consent election agreement between UPGWA and Wackenhut. Neither analyzed the relevant factors upon which the appropriateness of a collective bargaining unit is determined. The prior certification, which occurred in a proceeding which Petitioner was not a party to, was not sufficient to justify the Board's order. Indeed, Petitioner's right to contest the appropriateness of the collective bargaining unit as applied to it was not challenged below.**

Petitioner urged the court of appeals to remand the case to the Board so that the Board could articulate the reasons for its unit decision. The court of appeals decided that the Board did not abuse its discretion by concluding that the unit was appropriate as applied to Petitioner, and ordered Petitioner to recognize and bargain with UPGWA, as Wackenhut's successor. (See A. p. 4).

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*The designation (A. p. 32) refers to page 32 of the Appendix attached hereto. Similar designations will be used herein.

**The Board and courts of appeals have permitted employers to test a certification where it is urged that subsequent operational changes have rendered the certified unit inappropriate. See *NLRB v. Zayre Corp.*, 424 F.2d 1159 (5th Cir. 1970), *enforcing*, 170 NLRB No. 190 (1968); *NLRB v KVP Sutherland Paper Co.*, 356 F.2d 671 (6th Cir. 1966); *Cutter Laboratories*, 116 NLRB 260 (1956) (in all of the foregoing cases the employer was permitted to urge that changes in operations, which were made during the year following certification, rendered the certified unit inappropriate).

REASONS FOR GRANTING THE WRIT.

1. The Board's failure to fully articulate the reasons for its bargaining unit determination directly conflicts with this Court's decision in *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965).

In *Metropolitan*, an employer refused to bargain with a union in order to test the appropriateness of a collective bargaining unit certified by the Board. The Board, without articulating specific reasons, adhered to the unit decision made in the representation proceeding, and held that the employer had violated Sections 8(a)(1) and (5) of the Act. Since the decision made in the representation proceeding did not contain a full statement of the basis for the unit determination, this Court ordered that the case be remanded to the Board so that it could articulate reasons for finding the unit appropriate.

The basis of *Metropolitan* is that unless a Board decision contains articulated reasons it cannot be properly reviewed because a court cannot determine whether the Board has correctly exercised the authority and discretion granted it by Congress. See 380 U.S. at 442-443.

Similar to the position of the employer in *Metropolitan*, the Petitioner's obligation to recognize and bargain with UPGWA is dependent on a finding that there is an appropriate collective bargaining unit. In the instant case, as in *Metropolitan*, it is impossible to determine on what basis the Board exercised its discretion in holding that the Facility unit was appropriate.

Further, the Board's decision that the Facility unit was appropriate as applied to Petitioner was inconsistent with other unit decisions.*

The court of appeals only had before it the *post hoc* rationalizations of the Board's counsel. In *Metropolitan*, this Court stated that:

> ". . . Although Board counsel in his brief and argument before this Court has rationalized the different unit determinations in the variant factual situations of these cases on criteria other than a controlling effect being given to the extent of organization, the integrity of the administrative process requires that 'courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . .' *Burlington Truck Lines v. United States, supra,* [371 U.S.] at 168; see *Securities & Exchange Comm'n v. Chenery Corp.,* 332 U.S. 194, 196. For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency' . . ." (380 U.S. at 443-444.)

Further, the Board's decision was in violation of Section 7 of the Administrative Procedure Act which, in relevant part, requires all decisions to contain "a state-

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*See *NLRB v. Pinkerton's, Inc.,* 428 F.2d 479 (6th Cir. 1970); *NLRB v. Pinkerton's, Inc.,* 416 F.2d 627 (7th Cir. 1969); *NLRB v. Solis Theatre Corp.,* 403 F.2d 381 (2d Cir. 1968); *NLRB v. Pioneer Natural Gas Co.,* 397 F.2d 573 (5th Cir. 1968); *NLRB v. Purity Food Stores, Inc.,* 376 F.2d 497 (1st Cir.). *cert. denied,* 389 U.S. 959 (1967); *Pacific Drive-In Theatres Corp.,* 167 NLRB 661 (1967); *Paul M. O'Neill Int'l Detective Agency, Inc.,* 115 NLRB 760 (1956).

ment of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. Section 557(c) (1966). See *NLRB v. Clement-Blythe Companies*, 415 F.2d 78 (4th Cir. 1969).*

The issue raised herein was not covered by this Court's recent decision in *Magnesium Casting Co. v. NLRB*, 401 U.S. 137 (1971). In *Magnesium Casting*, an employer sought to test a regional director's bargaining unit determination by refusing to bargain with the union. The Board, without a complete review of the regional director's determination, held that the employer had committed an unfair labor practice by its refusal to bargain. The issue was whether the Board in an unfair labor practice proceeding must grant plenary review of the regional director's unit determination made in the representation proceeding. This Court held that in view of Section 3(b) of the Act, the Board, in an unfair labor practice case, was not required to undertake a plenary review of a regional director's unit determination made in the representation case. This Court noted that the regional director's decision was based upon the same rules regarding fact finding as would apply to the Board. This Court, citing *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146 (1941), stated that:

> ". . . Historically, the representation issue once fully litigated in the representation proceeding could not be relitigated in an unfair labor practice proceeding." (401 U.S. at 141.)

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*Cf. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763-767 (1969), where the Board was criticized for failing to follow the procedures of the Administrative Procedure Act related to rule-making.

Magnesium Casting was not a case where there was a complete failure to articulate the basis for the unit determination. The basis for the determination was fully set forth in the regional director's decision. In the instant case, there was no regional director's determination, but merely the regional director's approval of a consent election agreement between UPGWA and Wackenhut. Petitioner had the right to fully litigate the appropriateness of the unit as applied to it; and under *Metropolitan* and the Administrative Procedure Act, the Board or its agents at some stage of the proceedings were required to fully articulate the reasons for the unit decision.

2. The court of appeals failure to remand the case to the Board for it to fully articulate the basis for its unit determination conflicts with the decisions of other courts of appeals.

Courts of appeals of other circuits, in circumstances similar to the instant case, have refused to enforce the Board's bargaining orders and have remanded cases to the Board, where the Board has failed to articulate the reasons for holding a bargaining unit appropriate. *Upholsterers' International Union v. NLRB*, 419 F.2d 179 (3d Cir. 1969); *Rayonier Inc. v. NLRB*, 380 F.2d 187 (5th Cir. 1967); *NLRB v. Groendyke Transport, Inc.*, 372 F.2d 137 (10th Cir. 1967); *NLRB v. Davis Cafeteria, Inc.*, 358 F.2d 98 (5th Cir. 1966); *NLRB v. Purity Food Stores, Inc.*, 354 F.2d 926 (1st Cir. 1965). The failure of the court of appeals to remand the instant case to the Board is in conflict with such decisions. Even if the court was of the opinion that the unit was appropriate, it should have denied enforcement, pending a proper Board decision. See *NLRB v. Purity Food Stores, Inc.*, 354 F.2d 926, 931 (1st Cir. 1965).

3. The court of appeals decision enforcing the Board's finding of successorship conflicts with the decisions of other courts of appeals.

The decisions of courts of appeals and the Board on the requirements for successorship are irreconcilable and in conflict with the decisions in the instant case. In *NLRB v Alamo White Trucking Services, Inc.*, 273 F.2d 238 (5th Cir. 1959) the court refused to enforce a Board bargaining order because it held that the employer was not a successor. The new employer did not purchase accounts receivable, assume indebtednesses or obligations, or acquire books or records of the former employer. The new employer brought in its own management, obtained its own business licenses, used a different method of financing, and changed the business from a national operation to a local operation. Further, the new employer did not operate all of the departments that had been previously operated. However, the new employer did use the predecessor's building under a one year lease for the servicing of trucks; and retained one of the former employer's supervisors, as well as 8 of 14 of the former employer's employees. Thus, a majority of the new employer's work force were employees of the former employer and were engaged in the same work, at the same location, under the same supervision.* Based on all of the foregoing facts, the court concluded that there had been a change in the employing industry, and that the new employer was not obligated to recognize and bargain with the union which had represented the employees of the former employer. *See also, IAM, District Lodge 94 v. NLRB*, 414 F.2d

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*See *Alamo White Trucking Service, Inc.*, 122 NLRB 1174, 1176 (1959).

1135 (D.C. Cir.), *cert. denied*, 396 U.S. 889 (1969); *NLRB v. Aluminum Tubular Corp.*, 299 F.2d 595 (2nd Cir. 1962).

In contrast to *NLRB v. Alamo White Trucking Services, Inc.*, the determinations on successorship in the instant case were based upon a myopic analysis of the facts. In concluding that the employing industry remained unchanged, the court of appeals and the Board only looked at the facts concerning numbers of employees and work location, and disregarded not only the fact that there were no dealings between Petitioner and Wackenhut,* but also the fact that both Petitioner and Wackenhut had substantial existing organizations apart from their operations at the Facility. Petitioner's performance at the Facility did not affect the remaining parts of Wackenhut's business. The extent of integration of Petitioner's operation at the Facility is evidenced by the common supervision, labor relations policies and practices, wage scales, benefits and working conditions in the Ontario Sub-Office area, and employee interchange between Facility employees and Petitioner's other employees. It is significant that within six months after Petitioner commenced performance at the Facility, former Wackenhut guards constituted less than a majority of the work force. If the employing industry was changed in *NLRB v. Alamo White Trucking Services, Inc.*, it also was changed herein. The decision of the court of appeals on successorship in the instant case is in conflict with the decision

*In so doing, the court of appeals cited approvingly *Tom-A-Hawk Transit Inc. v. NLRB*, 419 F.2d 1025 (7th Cir. 1969). The Board relied on its decision in *Maintenance Inc.*, 148 NLRB 1299 (1964).

of the court of appeals in *NLRB v. Alamo White Trucking Services, Inc.*

The Board's decision in *Lincoln Private Police, Inc.*, 189 NLRB No. 103 (1971) is also irreconcilable with its decision in the instant case. In *Lincoln*, the respondent, an employer which provided plant protection services, solicited and obtained 42 percent of the former clients of another employer, Industrial Security Guards, Inc., which went out of business. A different company also obtained a substantial number of Industrial's other clients. Industrial's guards in the San Juan metropolitan area were represented by a union. The respondent did not assume any of the Industrial's assets and used different uniforms, vehicles and equipment, and had its own offices. However, 61 out of the respondent's total employee complement of 66 were former Industrial employees, who continued to work at their previous posts. The Board held that the former city-wide bargaining unit had been fragmented, the employing industry changed; and therefore, the respondent was not a successor. (See also, *Northwest Galvanizing Co.*, 168 NLRB 26 (1967).) Many of the factors in *Lincoln* which influenced the Board to find against successorship are present in the instant case.

4. The questions presented herein involve important issues of federal law which should be settled by this Court.

In order that there be proper judicial regulation of administrative agencies, it is necessary that a reviewing court have before it proper agency decisions. The failure of agencies to render decisions which contain articulated reasons on all issues of fact and law causes litigation to be protracted and the administrative agen-

cies to be discredited. This practice should be prohibited by this Court.

The lack of a definitive test for determining successorship in unfair labor practice cases has created a problem meritorious of resolution by this Court. At the present time there is no clearly defined test used by the Board and the courts of appeals in resolving successorship issues in such matters. It is not posssible to determine the weight given to various factors by the courts and the Board. A perfect example of this unpredictability is the instant case. Factors which were determinative in *NLRB v. Alamo White Trucking Services, Inc., supra, Lincoln Private Police, Inc., supra,* and *Northwest Galvanizing Co., supra,* were present but were not determinative herein. The need for clear criteria for determining successorship is especially important in cases involving contractors who are awarded contracts on the basis of competitive bids without any dealings with one another. There are hundreds of thousands of employees in the plant protection, maintenance, and other industries, who work for employers providing services under such contracts. In these industries third parties retain the right to change contractors on short notice. Therefore, turnover of employers is great and problems concerning successorship arise frequently. This Court should resolve the conflict and clarify the law concerning successorship in unfair labor practice cases.

There is yet another reason for this Court to consider the successorship issue. Petitioner was awarded the Facility contract on the basis of competitive bidding by Lockheed, a prime Government contractor. Petitioner's employees needed top-secret security clearances because of Lockheed's Government contracts. It is im-

portant that the United States Government and its prime contractors be permitted to change sub-contractors with as little difficulty as possible. The Board's finding of successorship in the instant case can have the effect of reducing competition among Government sub-contractors. Indeed, even the Board appears to have recognized this problem. In *Emerald Maintenance, Inc.*, 188 NLRB No. 139 (1971), the Board held that the rule, established by it in the instant case but not enforced by the court of appeals, that a successor employer is bound by its predecessor's collective bargaining agreement, does not apply to Government prime contractors who are subject to the Service Contract Act. 41 U.S.C. Section 351, *et seq.* (1964). Even though the Service Contract Act did not apply at the Facility, the rule of *Emerald Maintenance* should also apply to Government sub-contractors, like Petitioner, since many of the reasons given by the Board in *Emerald Maintenance* for treating Government contractors differently are present herein. It is submitted that in view of the fact that Petitioner was a Government sub-contractor, the present case requires a more rigorous test for successorship than that used by the court of appeals and the Board.

Conclusion.

For the foregoing reasons, it is urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Of Counsel:
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August 5, 1971.

APPENDIX A.

Opinion.

United States Court of Appeals, for the Second Circuit.

The William J. Burns International Detective Agency Inc., *Petitioner,* v. National Labor Relations Board, *Respondent,* International Union, United Plant Guard Workers of America and Its Amalgamated Local Union No. 162, *Intervenor.* Nos. 401-402—September Term, 1970. (Argued March 8, 1970; Decided April 26, 1971.) Docket Nos. 34889, 35055.

Before:

Hays and Feinberg, *Circuit Judges,* and Curtin, *District Judge.**

Hays, *Circuit Judge:*

From 1962 until 1967 the Wackenhut Corporation provided plant protection services for the facility of the Lockheed Aircraft Service Company located at Ontario International Airport, Ontario, California. In 1967 Lockheed arranged with the William J. Burns International Detective Agency, petitioner on this appeal, to take over the plant protection duties from Wackenhut and on May 31, 1967 Lockheed notified Wackenhut that Burns would take over on July 1.

On March 8, 1967 the International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 were certified as representatives of Wackenhut's employees working at Lockheed and on April 29, 1967 Wackenhut and the union entered into a collective bargaining agreement to be in effect from April 29, 1967 until April 28, 1970.

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*Of the United States District Court for the Western District of New York, sitting by designation.

On July 1, 1967 Burns took over the plant protection work at Lockheed. Burns employed for this purpose 42 guards, 27 of whom had previously been employed by Wackenhut.

The United Plant Guard Workers demanded that Burns recognize the union as the exclusive representative of Burns' employees at Lockheed and honor the collective agreement which the union had negotiated with Wackenhut. Burns refused both requests and the union thereupon filed unfair labor practice charges with the Board.

The Board, affirming a Trial Examiner's decision, held that Burns had violated Sections 8(a)(2) and (1) of the National Labor Relations Act (29 U.S.C. §§158-(a)(2) and (1) (1964)) by unlawfully recognizing and assisting the American Federation of Guards, a "rival" union; that it had violated Sections 8(a)(5) and (1) (29 U.S.C. §§158(a)(5) and (1) (1964)) by failing to recognize and bargain with the United Plant Guard Workers of America; and that Burns was obligated to honor the collective bargaining agreement which had been entered into between the latter union and the Wackenhut Corporation. Burns petitions for review of the Board's order except for that portion charging it with unlawful assistance and recognition of the American Federation of Guards; the Board cross petitions to enforce the entire order. We enforce the Board's order except for that part which requires the company to honor the collective agreement between Wackenhut and its union.

I.

The Board found that Burns violated Sections 8(a)-(2) and (1) of the Act by unlawfully assisting and

recognizing the American Federation of Guards. Although Burns has not petitioned for review of this portion of the order, it apparently seeks to avoid the consequences of the Board's action by stating that it "has elected to comply with that portion of the Board's order requiring it to cease and desist from recognizing the American Federation of Guards as representative of its guards at the Facility." The fact, however, that the employer is willing to comply does not render the cause moot; the Board may still seek and secure enforcement from the courts. *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950). The Board's finding of unlawful assistance and recognition is amply supported by the record. We enforce that part of its order.

II.

The remainder of the Board's order deals with its finding that Burns unlawfully refused to recognize and bargain with the United Plant Guard Workers of America and to honor the collective bargaining agreement which that union negotiated with Burns' predecessor, Wackenhut.

Burns first contends that a bargaining unit limited only to Burns guards working at Lockheed is not appropriate and that therefore, the Board's order is not enforceable. Burns argues that the high degree of integration of its Ontario Sub-Office, which managed 30 contracts in addition to the contract at Lockheed, required a bargaining unit encompassing the entire area, particularly in view of the centralized control of labor relations that Burns claims existed there. The Board on the other hand, argues, in support of its finding, that Burns' employees serviced the same facility that was considered an appropriate unit for Wackenhut's em-

ployees, that Burns' employees had a community of interest, were supervised by one man on a full-time daily basis who had hiring and firing authority, and were paid a distinctly higher wage than other Burns employees in the Los Angeles branch area (which included Ontario).

The Board has a large measure of discretion in making unit determinations. See *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947); *Continental Insurance Co. v. NLRB*, 409 F.2d 727, 728 (2d Cir.), cert. denied, 396 U.S. 902 (1969). The centralization of final decisions on labor policy is not per se decisive of the extent of an appropriate unit where the Board has substantial justification for establishing a smaller unit. *Continental Insurance Co. v. NLRB, supra* at 729. We cannot say that the Board lacked such justification in this case.

We agree as well with the Board's finding that Burns is a successor employer to Wackenhut and as such is required to recognize the union chosen by Wackenhut's employees. See, e.g., *Tom-A-Hawk Transit, Inc. v. NLRB*, 419 F.2d 1025, 1026-1027 (7th Cir. 1969). The determination that an employer is a successor is made on the basis of "continuity in the business operation," *NLRB v. Zayre Corp.*, 424 F.2d 1159, 1162 (5th Cir. 1970), that is, whether the operation is "essentially the same as that previously conducted. . . ." *S. S. Kresge Co. v. NLRB*, 416 F.2d 1225, 1234 (6th Cir. 1969). Has the "employing industry . . . retained its identity and continuity to a degree sufficient to make it reasonable that the successor employer be required to recognize the incumbent union[?]" (*Tom-A-Hawk Transit, Inc. v. NLRB, supra* at 1027.) We think that it has in the instant case.

All of the important factors which the Board has used and the courts have approved are present in the instant case: "continuation of the same types of product lines, departmental organization, employee identity and job functions." *NLRB v. Zayre Corp., supra* at 1163 (footnotes omitted). Both Burns and Wackenhut are nationwide organizations; both performed the identical services at the same facility; although Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors; and finally, and perhaps most significantly, Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42.[1]

III.

From the fact that Burns was the successor of Wackenhut within the meaning of that term as applied by the Board and the courts, and was required to recognize the union chosen by Wackenhut's employees, it does not follow that Burns could be ordered by the Board to honor the collective agreement to which Wackenhut and its union were parties. In none of the previous successorship cases has the Board ever reached that result. The successor has always been held merely to have the duty of bargaining with his predecessor's union. We conclude that in ordering Burns to honor

[1]Although the absence of wholesale hiring of predecessor's employees does not require a finding that there has been no successorship, see *Monroe Sander Corporation v. Livingston*, 377 F.2d 6, 12 (2d Cir.), cert. denied, 389 U.S. 831 (1967), its presence is relevant "to show similarity of operations." *Id.* The Court in *John Wiley & Sons v. Livingston*, 376 U.S. 543, 551 (1964) placed great stress on this single factor by holding that "relevant similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty."

the contract executed by Wackenhut, the Board has exceeded its powers. Neither the applicable case law nor the national labor policy justifies the Board in imposing a collective agreement upon an unwilling party who had no part in the negotiation of the agreement.

The action of the Board in this case is contrary to the letter as well as the spirit of the Supreme Court's recent decision in *H. K. Porter Co., Inc. v. National Labor Relations Board,* 397 U.S. 99 (1970). That case held that the Board and the courts "[are] without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement." *Id.* at 102. As the Court points out, the legislative history of the National Labor Relations Act and of the enactment of §8(d) of the Act,[2] strongly supports the conclusion that "the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *Id.* at 108.

> "While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *Id.* at 108.

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[2]Section 8(d) reads as follows:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .*" 29 U.S.C. §158(d) (1964) (emphasis added).

The Board professes to find authority for its order to Burns to honor the Wackenhut contract in *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

The Board does not claim that *Wiley* stands directly for the proposition that all of a predecessor's contractual obligations can be imposed on an unwilling successor. The holding of *Wiley* is merely that "in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement." *Id.* at 548. Indeed, the *Wiley* case arose in the context of an action to compel arbitration under §301 of the Labor Management Relations Act. (29 U.S.C. §185 (1964).)

The Board contends, however, that the policy considerations upon which *Wiley* is based support its action in this case. But the policy behind the decision in *Wiley* was founded upon the Court's recognition of "the central role of arbitration in effectuating national labor policy." *Id.* at 549.[3] The Court's determination is only that "the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed." *Id.* at 550 (footnote omitted).

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[3]The Court repeatedly emphasized this basis for its decision and the limited effect of its holding:

> "Here, the question is whether Wiley, which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, is bound at all *by the agreement's arbitration provision*.
>
> . . . .
>
> . . . It would derogate from *'the federal policy of settling labor disputes by arbitration,'* . . . if a change in the corporate structure and ownership of a business enterprise had the automatic consequence of *removing a duty to arbitrate* previously established." *John Wiley & Sons v. Livingston*, 376 U.S. 543, 547, 549 (1964) (citation omitted) (emphasis added).

Although it is true that a rule such as that promulgated by the Board would put future potential successor employers on notice that existing contracts would be obligatory on them and thus provide them with a choice of action, the rule would bind the union to a contract with a successor employer without giving it any opportunity for choice. This could sometimes result in serious inequities. For example, where a union made substantial concessions to a failing employer in order to keep him in business and then discovered that the successor was a strong, financially viable organization, it would have no chance to bargain anew. The Board's holding that it will consider "unusual circumstances" (see, e.g., *Emerald Maintenance, Inc.*, 188 N.L.R.B. No. 139 (1971) where the Board, citing "unusual circumstances," refused to apply the rule it had earlier laid down in *Burns*) is no answer since it merely arrogates to the Board the additional power to pick and choose among the contractual provisions it will impose on non-contracting parties.

We refuse enforcement to that portion of the Board's order that requires Burns to honor the terms of the collective agreement between the union and Wackenhut.

APPENDIX B.

Decision and Order.

United States of America, Before the National Labor Relations Board.

The William J. Burns International Detective Agency, Inc. and International Union, United Plant Guard Workers of America and Its Amalgamated Local Union No. 162 and American Federation of Guards, Local 1, Party in Interest. Case 31-CA-776; May 7, 1970.

On June 4, 1968, Trial Examiner E. Don Wilson issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in certain other unfair labor practices. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief, and the Charging Party (herein referred to as the Union) and General Counsel filed briefs in support of the Trial Examiner's Decision.

On January 31, 1969, the National Labor Relations Board, having determined that the instant case raised issues of substantial importance in the administration of the National Labor Relations Act, as amended, ordered that this case be consolidated with three others[1] for the purpose of oral argument before the Board on March 12, 1969. The parties were given permission to

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[1] *Travelodge Corp. et al.*, Case 21-CA-7694; *Hackney Iron & Steel Co.*, Cases 23-CA-2505, 23-CA-2554; and *Kota Division of Dura Corporation*, 18-CA-2419.

file further briefs. Subsequently, on February 19, 1969, the Board extended the date of the oral argument to April 23, 1969.

The Board also invited certain interested parties to file briefs *amici curiae* and to participate in oral argument. Briefs were filed by: The Chamber of Commerce of the United States; American Federation of Labor and Congress of Industrial Organizations; International Union, United Automobile, Aerospace and Agriculture Implement Workers; The International Brotherood of Teamsters, Chauffeurs, Warehousemen & Helpers of America; and the National Federation of Independent Unions. The Chamber of Commerce of the United States, The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and the National Federation of Independent Unions did not choose to participate in the argument. The National Association of Manufacturers declined to either file a brief or participate in the argument.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, the oral arguments, Respondent's motions to reopen the record and the General Counsel's and Charging Party's opposition thereto, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

Briefly, the facts show that Wackenhut performed plant protection services for Lockheed Aircraft Service Company, Ontario International Airport, Ontario, California. On March 8, 1967,[2] the Union was certified as

[2]Hereinafter, all dates refer to 1967 unless otherwise stated.

exclusive bargaining representative for all Wackenhut's full-time and regular part-time plant protection employees. On April 29, Wackenhut and the Union entered into a collective-bargaining agreement effective until April 28, 1970.

Pursuant to its agreement with Wackenhut, Lockheed let the service contract out for bids. On may 15, at a prebid conference attended by several general service contractors including the Respondent, Burns, Lockheed advised the prospective bidders that Wackenhut's guards were represented by the Union which had a recent Board Certification, and that there was in existence a labor contract between Wackenhut and the Union covering these employees. On May 31, Wackenhut was informed by Lockheed that Respondent would perform the guard services as of July 1.

Prior to its July 1 takeover, Respondent interviewed guards for employment who were at that time employed by Wackenhut. As more fully described by the Trial Examiner, the Respondent assisted the American Federation of Guards in the solicitation of employees Elmer Reitzel, Thomas Ware, Charles Blankemeier, Harris Camp, Stanley Ganiewski, and Walter Drake. On June 29, Respondent recognized the American Federation of Guards as bargaining representative.

On July 1, when Respondent officially began the guard service duties theretofore performed by Wackenhut, some 27 guards formerly working at Lockheed in the employ of Wackenhut began work as guard employees of Respondent. In addition, 15 employees of Respondent were transferred from other jobs and began work at Lockheed. Thus, in assuming guard functions at Lockheed, a majority of Respondent's work force was

made up of ex-Wackenhut employees, and the nature of the business remained the same.

On July 12, the Union, by letter, made a demand upon Respondent that it recognize the Union as bargaining representative and honor the Union's collective-bargaining agreement with Wackenhut. By letter dated July 24, the Respondent declined recognition. Unfair labor practice charges were then filed which resulted in the issuance of the complaint in the instant proceeding.

The Trial Examiner concluded that Respondent violated Section 8(a)(2) and (1) of the National Labor Relations Act, as amended, by assisting the American Federation of Guards in organizing employees, and by recognizing the American Federation of Guards when it did not represent an uncoerced majority of Respondent's employees. In addition, the Trial Examiner found that Respondent was a successor employer to Wackenhut and that it violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the bargaining representative of its employees. We agree with these findings of the Trial Examiner.

We also agree with the Trial Examiner that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to abide by the 1967 contract between Wackenhut and the Union. However, in view of the significance of the issue presented, we believe it is necessary to explicate fully our reasons for doing so.

The Supreme Court's Decision in *John Wiley & Sons v. Livingston*[3] altered the perspective in which a suc-

[3] 376 U.S. 543.

cessor employer's obligations to honor the provisions of a collective-bargaining agreement negotiated by his predecessor must be viewed. There, the predecessor employer was absorbed by merger into a larger acquiring company (Wiley). Some of the predecessor's employees were represented by a union, and the collective-bargaining contract, which did not contain a successors clause, was not scheduled to expire until over a year after the merger took place. Pursuant to an arbitration clause in the contract, the union brought suit to compel Wiley to arbitrate its claim that certain contract rights had survived the merger. The Court held that even though the predecessor had disappeared as a result of the merger, all rights of the employees covered by the preexisting collective-bargaining agreement did not terminate. The Court determined that under the circumstances presented Wiley was bound to arbitrate its obligations under the preexisting collective-bargaining agreement.

In reaching its conclusion, the Court specifically rejected the contention that Wiley could not be required to arbitrate under the preexisting collective-bargaining agreement because it was not a party to that agreement and had not consented to be bound by it. The Court stated at 376 U.S., 550:

> While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, (footnote omitted), a collective bargaining agreement is not an ordinary contract . . . '[I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . The collective bargaining agreement covers the whole employment relationship. It calls into being a new com-

> mon law—the common law of a particular industry or of a particular plant.' (Citation omitted) . . . Central to the peculiar status and functions of a collective bargaining agreement is the fact dictated both by circumstances . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship.

As the foregoing indicates, the Supreme Court refused to rely upon common law contract doctrine in determining the nature of a purchasing-employer's obligation to arbitrate matters arising under a contract it had not signed. Rather, the Court construed the contract in the context of a national labor policy which accords a central role to arbitration as "the substitute for industrial strife" and as "part and parcel of collective bargaining itself" and found the necessary contractual foundation for the duty to arbitrate in the contract negotiated by Wiley's predecessor:

> "Therefore, although the duty to arbitrate, as we have said . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy." (376 U.S. 551).

The concept of substantial continuity in the employing industry enunciated as a necessary condition for the survival of the duty to arbitrate when the ownership of a business changes hands is at the heart of our determination that a purchasing employer is a successor-employer within the meaning of the Act. In essence, the finding of successorship involves a judgment that the employing industry has remained essentially the same despite the change in ownership.[4] A normal consequence of such finding is that the successor employer is obligated to recognize and bargain with the union duly selected by the employees—albeit prior to the change in ownership—as their collective-bargaining representative. This consequence of successorship is rooted, *inter alia*, in the fact that

> "[i]t is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace. . . .,"[5]

as well as in the fact that, having chosen a bargaining representative,

> "[t]here is no reason to believe that the employees will change their attitudes merely because the identity of their employer has changed."[6]

Binding the successor-employer to his predecessor's bargaining obligation furthers the policy of protecting the employees' exercise of the right to engage in collective bargaining through representatives of their own choosing. Requiring the successor-employer to negotiate proposed changes in existing terms and conditions of

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[4]See, e.g., *Cruse Motors, Inc.*, 105 NLRB 242, 247.

[5]*Kiddie Kover Co. v. N.L.R.B.*, 105 F. 2d 179, 188 (C.A. 6).

[6]*N.L.R.B. v. Albert Armato*, 199 F. 2d 800, 803 (C.A. 7).

employment with the employees' bargaining representative promotes stability in the employing enterprise's labor relations and furthers the interests of industrial peace. The obligation to bargain imposed on a successor-employer includes the negative injunction to refrain from unilaterally changing wages and other benefits established by a prior collective-bargaining agreement even though that agreement has expired.[7] In this respect, the successor-employer's obligations are the same as those imposed upon employers generally during the period between collective-bargaining agreements.[8]

The question before us thus narrows to whether the national labor policy embodied in the Act requires the successor-employer to take over and honor a collective-bargaining agreement negotiated on behalf of the employing enterprise by the predecessor. We hold that, absent unusual circumstances, the Act imposes such an obligation.

"The history of the collective bargaining process demonstrates that its object has long been an agreement between employer and employees as to wages, hours and working conditions evidenced by a signed contract or statement in writing, which serves both as recognition of the union with which the agreement has been reached and as a permanent memorial of its terms . . . [t]he signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife." (*Heinz Co. v. N.L.R.B.*, 311

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[7]*Harold W. Hinson d/b/a Hen House Market No. 3*, 175 NLRB No. 100, enforced, F.2d (C.A. 8) (1970). *Overnite Transportation Co.*, 157 NLRB 1185, enfd. 375 F.2d 765 (C.A. 4), cert. denied 398 U.S. 838.

[8]*Marine & Shipbuilding Workers v. N.L.R.B.* 320 F.2d 615 (C.A. 3)

U.S. 514). In enacting the 1947 amendments to the Act, Congress added Section 8(d) in which it defined in some detail the duty to bargain collectively, including within that definition a specific ratification of the holding in the *Heinz* case.

Section 8(d) also defined the duty to bargain as meaning that, "where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce. . . . . no party to such contract shall terminate or modify such contract", unless it serves prescribed notices on the other party, and maintains its contract in effect for 60 days therefrom, even though that period may extend beyond the contract's natural termination or expiration date. Section 8(d) also provides that a party to a collective-bargaining agreement has the right to refrain from discussing modifications which are to take effect prior to the period fixed by the contract itself for reopening negotiations. Section 8(d) thus clearly demonstrates Congress' recognition of the paramount role in maintaining industrial peace played by parties' adherence to existing collective-bargaining agreements.

The impressive policy considerations favoring the maintenance and adherence to existing collective-bargaining agreements are not wholly overborne by the fact that Burns has not signed the contract here in issue. Nor can a holding that Burns is obligated to honor and adhere to the express terms of the contract readily be equated with compelling Burns to agree to a bargaining proposal or make a concession it is unwilling to make.[9] Indisputably, there is a contract.

[9]Section 8(d) provides that performance of the mutual obligation to bargain does not compel either party to agree to a proposal or require the making of a concession.

That contract covers the employees of the employing industry which Burns took over; it was negotiated on behalf of the employing enterprise by Wackenhut, Burns predecessor. That contract is reasonably related to Burns through its takeover of Wackenhut's Lockheed service functions and its hiring of Wackenhut employees. We find, therefore, that Burns is bound to that contract as if it were a signatory thereto, and that its failure to maintain the contract in effect is violative of Sections 8(d) and 8(a)(5) of the Act.[10]

In the normal case, we perceive no real inequity in requiring a "successor-employer" to take over his predecessor's collective-bargaining agreement, for he stands in the shoes of his predecessor. He can make whatever adjustments the acceptance of such obligation may dictate in his negotiations concerning the takeover of the business. Normally, employees cannot make a comparable adjustment. Their basic security is the collective-bargaining agreement negotiated on their behalf. In the instant case this is certainly so. They work in an industry in which the identity of their employer is subject to annual bidding for the right to perform the services they are engaged in furnishing. The contract involved herein was negotiated for a term of 3 years, but had been in existence for only 2 months at the time of Burns' takeover. Burns had knowledge of the agreement when it bid for the Lockheed service contract. It hired employees on whose behalf the agreement was negotiated. Accordingly, in order to fully protect the employees' exercise of the right to bargain collectively and

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[10] *C & S Industries, Inc.*, 158 NLRB 454; *N.L.R.B. v. Huttig Sash & Door Co.*, 377 F.2d 964 (C.A. 8), enforcing 154 NLRB 811. See also, *Oilfield Maintenance Co., Inc., etc.*, 142 NLRB 1384.

to promote the maintenance of stable bargaining relationships and concommittantly industrial peace in this industry, we conclude that Respondent Burns must be held bound to its predecessor's contract.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, The William J. Burns International Detective Agency, Inc., Ontario, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, with the qualification described below.[11]

Dated, Washington, D.C. May 7, 1970.

Frank W. McCulloch, Chairman
John H. Fanning, Member
Gerald A. Brown, Member
NATIONAL LABOR RELATIONS BOARD

[Seal]

[11]Substitute "Judgment" for "Decree" wherever it occurs in footnote 6 of the Trial Examiner's Recommended Order.

Member Jenkins, dissenting:

My partial dissent is as follows:

There is no requirement in the Act that a successor employer be bound by the collective bargaining agreement in effect when the business is transferred. Whether to require the successor to be bound is therefore a matter of judgment or interpretation of the national labor policy. In the absence of a clear statutory command or binding judicial precedent, I would not impose the existing agreement on either the union or the employer.

Where the enterprise is marginal or faltering, the new management may have to rearrange the terms and conditions of employment if the business and the jobs are to survive. The Union also may, as in the companion case of *Kota Division of Dura Corporation*, 182 NLRB No. 51, want the opportunity to alter employment conditions in the light of the new economic circumstances and relations brought into the situation by the new employer. In such cases, our goal should be to permit the parties flexibility in working out their new arrangements if either desires to do so, rather than to impose the existing agreement when one side may be seriously dissatisfied with it. The new employer is not a party to the agreement, and the union did not join in shaping and executing it with his circumstances in mind. Thus, to impose the agreement on the new relation may in many cases prove a source of friction and disruption, rather than the stability for which my colleagues hope.

Section 8(d) of the Act, in requiring "parties" to adhere to their agreements and give notice of termination well in advance, hardly supports the conclusion that the successor is bound by the agreement; for that section

refers only to a "party" to the contract, the successor is not a party, and the issue before us is whether he should be treated as if he were a party.

Unlike my colleagues, who rely principally on *John Wiley and Sons v. Livingston* to require that the existing agreement must continue in effect beyond the transfer of the business, I see little in that case to support that conclusion. The employees' rights at issue there were of a very narrow range, such as seniority, vacation pay, pension contributions and severance pay, rights which were fixed or already accrued by being, at least in part, earned through past performance of work, or "vested" as the Court referred to them. The Court held only that the arbitration clause in the old agreement survived the merger as an available method of resolving issues concerning these "vested" rights. This hardly amounts to a holding that the entire old agreement must be imposed on the new employment relation. Indeed, the Court's approval of arbitration and its inherent flexibility and adjustment to unforeseen circumstances might indicate that the old agreement should not be so imposed.

Accordingly, I would not hold that Burns is bound by the agreement between its predecessor, Wackenhut, and the Union.

Dated, Washington, D. C. May 7, 1970.

Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX C.

Trial Examiner's Decision.

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California.

The William J. Burns International Detective Agency, Inc. and International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 and American Federation of Guards, Local 1 Party in Interest. Case No. 31-CA-776; June 4, 1968.

Statement of the Case

E. DON WILSON, Trial Examiner: The original charge was filed on July 24, 1967, by International Union, United Plant Guard Workers of America and its Amalgamated Local Union, No. 162, herein the Union, and an amended charge was filed on August 1, 1967. Upon the charge as amended, the General Counsel of the National Labor Relations Board, herein the Board, issued a complaint and notice of hearing dated October 25, 1967, alleging that The William J. Burns International Detective Agency, Inc., herein Respondent, had violated Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act, herein the Act.

Pursuant to due notice, a hearing in this matter was held before me in Los Angeles, California, on December 19 and 20, 1967. All parties but the party in interest fully participated. Briefs for the General Counsel, Respondent, and Charging Party have been received and considered.

Upon the entire record[1] in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. Respondent's Business

At all material times, Respondent has been a New York corporation with offices in various parts of the United States, including an office at Los Angeles, California, where it is engaged in providing protective, guard, and detective services to business firms throughout the United States.

In the course and conduct of its business operations, Respondent's Los Angeles office has an annual volume of business in excess of $500,000, and annually performs services valued in excess of $50,000 for firms outside the State of California, and annually performs services valued in excess of $50,000 for firms in the Los Angeles area, each of which ships products valued in excess of $50,000 directly outside the State of California.

The Wackenhut Corporation, herein Wackenhut, is a Florida corporation engaged in plant protection and security services for firms located throughout the United States. In the course and conduct of its business operations, Wackenhut has an annual gross volume of business in excess of $500,000, and it annually performs services valued in excess of $50,000 outside Florida.

Respondent and Wackenhut, each, is and at all material times has been, an employer engaged in commerce within the meaning of the Act.

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[1]The motion to correct the transcript is granted as is the motion to admit Respondent's Exhibit No. 5 into evidence.

II. The Labor Organizations

The Union and American Federation of Guards, Local 1, herein AFG, are labor organizations within the meaning of the Act.

III. The Unfair Labor Practices

A. *The Issues*

The issues include the following:

(1) Is Respondent a successor to Wackenhut;

(2) Is a unit limited to employees of Respondent at Lockheed, appropriate;

(3) Has Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and by refusing to give effect to a contract between Wackenhut and the Union;

(4) Has Respondent violated Section 8(a)(2) and (1) of the Act by recognizing AFG as the bargaining representative of Respondent's employees at Lockheed and by requiring membership in or an application for membership in AFG as a condition of employment at Lockheed;

(5) Did Respondent violate Section 8(a)(1) and (2) of the Act by promising and giving an employee a promotion and a raise because he assisted the AFG; and

(6) Did Respondent violate Section 8(a)(2) and (1) of the Act by assisting AFG in organizing Respondent's employees and by recognizing AFG when AFG did not represent an uncoerced majority of Respondent's employees?

B. *Respondent, Wackenhut and the Appropriate Unit*

At least beginning February 28, 1967,[2] Wackenhut performed plant protection services for Lockheed Aircraft Service Company, herein Lockheed, at Ontario International Airport. On this date, a majority of the employees in the following unit selected the Union as their bargaining representative in a Board election. The unit is:

> All full-time and regular part-time employees of Wackenhut performing plant protection duties as determined in Section 9(b)(3) of the Act at Lockheed, Ontario International Airport; excluding office clerical employees, professional employees, supervisors, and all other employees as defined in the Act.

On March 8, the Regional Director certified the Union as the exclusive bargaining representative of the employees in the above unit.

On April 29, Wackenhut entered into a collective-bargaining contract with the Union to be effective until April 28, 1970. It contained a legal union security provision.

As provided by the agreement between Lockheed and Wackenhut, Lockheed let the service contract out for bids. On May 15, Lockheed advised Respondent that Wackenhut's guards were represented by the Union which had a contract after Board certification. On May 31, Wackenhut was told by Lockheed that Respondent would perform the guard services as of July 1. Wackenhut ceased performing the guard services and Respondent began performing the guard services for

[2]Hereinafter all dates refer to 1967 unless otherwise stated.

Lockheed. On July 1, Respondent's employees included 27 guards formerly employed by Wackenhut and 15 transferred employees of Respondent.

C. *Respondent Assists the AFG*

1. Reitzel

Elmer H. Reitzel was formerly an employee of Wackenhut. He was "Chairman of the Board" of the Wackenhut employees. About June 2, Major George Goddard, a supervisor of Respondent interviewed Reitzel and gave him a job application. A few days later, Reitzel spoke to Mr. New, Respondent's Operations Manager, and a supervisor, about the job. New told Reitzel to see Jack Foley, an organizer for the AFG. Foley was seated from 15 to 30 feet away from New, in the same room. Foley gave Reitzel an AFG authorization card to sign and said employees had to belong to the AFG to work for Respondent, but Reitzel did not then sign it. Foley said Respondent couldn't live with the Union's contract. Reitzel asked for a copy of the AFG contract but did not get one. Foley told Reitzel that as steward he would like to have him get the employees to sign authorization cards for the AFG. Reitzel said he'd talk to the employees. Reitzel left and then called a representative of the Union in Detroit. Reitzel told the representative Respondent and AFG wanted the employees to sign authorization cards to keep their jobs. The representative said it was all right if it meant their jobs. Foley mailed pledge cards to Reitzel. About 2 days later, Foley came to Reitzel and spoke to him about the cards. I have carefully studied Reitzel's testimony and find it is confused as to dates. I am convinced that Reitzel just did not remember

when Goddard told Reitzel Respondent was considering promoting him to sergeant. Foley asked Reitzel if he had gotten authorization cards, which Foley had given him, signed. Reitzel said he was working on them. In the latter part of June, Goddard phoned Reitzel and asked him to bring the signed pledge cards to Respondent's office. Reitzel failed to do so. About 10 o'clock that evening, Captain Kretzlow, a supervisor, came to Reitzel's home and asked for the signed AFG cards and Reitzel explained that he didn't have them with him. The next morning at work, Goddard came to Reitzel and picked up the AFG cards.[3]

When Respondent took over Wackenhut's operations, Reitzel was promoted from guard to sergeant with a raise from $1.75 to $1.95 an hour with no additional obligations. There is insufficient probative evidence that Reitzel was promised the promotion or was promoted to sergeant in violation of Section 8(a)(1) or (2) of the Act. Reitzel's recollection of when he was told he would be promoted to sergeant is too confused to permit a finding.

Respondent violated Section 8(a)(2) and (1) of the Act by New's direction to Reitzel to see Foley who as part of the hiring procedure told Reitzel he had to sign an AFG pledge card to work for Respondent and asked him to get other employees to sign for the AFG. Respondent similarly violated the Act by Goddard's request of Reitzel that he bring the signed AFG cards to Respondent's office and by Kretzlow's asking for the cards and by Goddard picking them up from Reitzel at work.

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[3]The record makes clear there were about 18.

2. Thomas C. Ware

Ware was employed by Wackenhut as a guard. In early June, he went to Respondent's office with a filled out application for employment by Respondent. He gave his application to New. He told New he would like to know about pay and about hospitalization and other details. New directed him to Foley for answers. He saw Foley in the same room. Foley gave him no answers. Foley repeatedly pushed an AFG authorization card in front of Ware and told him the Union was out and that he had to sign the AFG card or not work for Respondent. Ware said that "in California" he had 30 days to make up his mind.

I find Respondent violated Section 8(a)(2) and (1) of the Act by New's assisting Foley in his solicitation for the AFG, of Ware.

3. Charles A. Blankemeier

On June 28, Blankemeier received an application for employment. The next day he returned the application when he went to Respondent's office to pick up a uniform. He saw Goddard and Kretzlow and asked for his uniform. As he was preparing to leave with his new uniform, Goddard told him he had to sign an AFG authorization slip before he could have Respondent's uniform. He signed the AFG slip with Foley's name on it and left with the uniform.

I find Respondent violated Section 8(a)(2) and (1) of the Act by conditioning his receipt of Respondent's uniform, necessary for work with Respondent, on his signing an AFG authorization card.

4. Harris K. Camp

About June 10, Camp went to Respondent's office for an application. He saw Goddard. Goddard told him to go into the next room. Camp did so and found Foley to be the only one there. Foley told him Respondent now had the contract and if Camp wanted to work for Respondent he would have to sign the AFG card. Foley handed him a card and Camp said he would think it over. He left and again saw Goddard who gave him a work application. The next day Camp brought this application back to Goddard. He was measured for Respondent's uniform. A couple of weeks later, on June 30, he went in to pick up his uniform and on top of it was an AFG union slip that was supposed to be signed by him. In the presence of Goddard, Kretzlow gave him the AFG slip to sign. He said it had to be signed. It was in with the paper work for the clothing.

I find Respondent, through Goddard and Kretzlow, assisted the AFG in signing up Camp, in violation of Section 8(a)(2) and (1) of the Act.

5. Stanley L. Ganiewski

Ganiewski was a Wackenhut guard who went to Respondent's office for employment about June 10. He saw Goddard and asked where the applications were. Goddard pointed to a room. Ganiewski went there and found Foley there alone. Foley told him he'd have to join the AFG to work for Respondent. Foley spoke at length about the AFG and its contract. He asked Ganiewski to sign an AFG authorization card. The latter said he'd think about it and left.

I find Respondent, through Goddard, assisted the AFG in its solicitation of Ganiewski through Foley, in violation of Section 8(a)(2) and (1) of the Act.

6. Walter Drake

In the latter part of June, Drake went to Respondent's office and talked to Goddard and some captain. The captain brought to him an authorization card of the AFG and said he would have to sign it before he could go to work. He said it was for "their union." Drake said he had 30 days to sign the card. They said he would have to sign it before he could go to work. Later that day, Goddard told him he had 30 days to sign but Respondent would like to have the AFG authorization signed before he went to work. Drake signed the card.

Respondent, through Goddard and the captain, assisted the AFG in its organizing activities in connection with Drake and thereby violated Section 8(a)(2) and (1) of the Act.

C. *Respondent is a Successor to Wackenhut and Obligated to Bargain With the Union*

When Respondent began its operations at Lockheed during the certification year, and during the contract term, it performed the same operations at Lockheed as had Wackenhut. It has in its employ a majority of Wackenhut's former employees. There has been a substantial continuity of Wackenhut's business operations by Respondent. At least substantially the same business facilities have been used. The working conditions are substantially the same. The services provided are substantially the same. Respondent's taking over Wackenhut's operations at Lockheed constituted no change in

the "employing industry forming the appropriate bargaining unit for which the Union had been certified." *Maintenance, Incorporated,* 148 NLRB 1299. As in *Maintenance,* "Respondent commenced the performance of substantially the identical operations that had theretofore been performed by [Wackenhut], servicing the same facilities for the same customers in substantially the same manner and at the same work site, and utilizing for that purpose a former [Wackenhut] work force to perform the same functions and exercise the same skills."

Respondent had the duty to honor its employees' choice of a bargaining representative, the Union. This was a public obligation not arising from private contract. The Union "was entitled to statutory recognition at the time Respondent took over." *Maintenance, Incorporated, supra.*

It is clear "that Respondent assumed the obligation the Act imposes upon an employer to recognize and deal with its employees' majority representative when it selected as its work force the employees of the previous employer to perform the same tasks at the same place as they had in the past. These employees had already expressed their choice of bargaining representative, and continued to constitute an appropriate bargaining unit. As the certification year had not yet expired at the time the Union sought recognition and bargaining,[4] the presumption of the Union's continuing majority status applied and was not then vulnerable to attack." *Maintenance, Incorporated, supra.* Respondent was obligated to recognize and bargain with the Union as the statutory representative of its employees

[4]July 12.

in an appropriate unit. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to comply with the Union's July 12 demand for bargaining. It has been found that Respondent knew, when it bid for the Lockheed contract, that the Union was the certified bargaining representative.

Respondent challenges the appropriateness of the bargaining unit as applied to Wackenhut, and as applied to Respondent. While a broader unit might have been appropriate, I find a unit of guards limited to a single facility is an appropriate unit. Here the certification was pursuant to a consent election agreement. There is no evidence that the Regional Director was arbitrary or capricious. A mere change of employers does not destroy the certification.

D. *Respondent Violated Section 8(a)(2) and (1) By Recognizing the AFG*

As has heretofore been found, the AFG did not represent an uncoerced majority of Respondent's employees on or before July 1, when Respondent recognized the AFG. Consequently, Respondent assisted AFG in violation of Section 8(a)(2) and (1) of the Act when it recognized the AFG as bargaining representative.

E. *Respondent Violated Section 8(a)(5) and (1) of the Act By Not Honoring and Assuming and Doing Business Under the Contract Between the Union and Respondent's Predecessor, Wackenhut*

On April 29, the Union and Wackenhut entered into a collective-bargaining agreement covering Wackenhut's Lockheed employees, the contract to be effective until 1970.

While *Wiley v. Livingston*, 376 U.S. 543, dealt specifically only with the obligation of a successor employer to arbitrate under a contract with a union, the decision made clear that the rights of employees under a collective-bargaining agreement are not automatically terminated by the fact that one employer succeeds to the rights of another employer. The Court was concerned with whether, as here, the business remains the same. The Court recognized that employees do not ordinarily take part in negotiations, leading to changes in corporate ownership. The well being of employees is at best incidental to the negotiations. The Court held, "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." The Court emphasized that a collective-bargaining agreement is not an ordinary contract.

The Union persuasively argues that in an industry of the nature here involved where the employer may be changed from year to year, the union contract should follow the unit rather than the employer. The employees may select a union which obtains a contract for their benefit and find the employer changes. If the new employer may ignore the contract, all negotiations for peaceful contractual relations come to naught. Here, if Respondent does not assume and honor the contract, economic stability is destroyed. To leave Respondent free to bargain from scratch and ignore the common law of the employing industry is to leave an industry such as this to contracts of no substance or meaning.

The *Wiley* reasoning has been applied in a situation very similar to the instant case. *Wackenhut Corporation v. International Union, United Plant Guard Workers of America,* 332 F.2d 954 (C.A. 9). There the court found that where, as here, there is a "substantial similarity of operation and continuity of identity of the business enterprise before and after the change in ownership," the successor employer is bound by the entire contract of the predecessor.

I find that Respondent by refusing to honor the contract between Wackenhut and the Union, refused to bargain in violation of Section 8(a)(5) and (1) of the Act since on or about July 24.[5]

IV. The Effect of the Unfair Labor Practices

The activities of Respondent set forth in section III, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States, leading to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

Upon the foregoing findings of fact and the entire record in the case, I make the following conclusions of law:

1. Respondent and Wackenhut are employers engaged in commerce within the meaning of the Act.

2. AFG and the Union are labor organizations within the meaning of the Act.

3. All full-time and regular part-time employees of Respondent performing plant protection duties as determined in Section 9(b)(3) of the Act at Lockheed,

[5]Cf. *Michaud Bus Lines, Inc.*, 171 NLRB No. 21.

Ontario International Airport; excluding office clerical employees, professional employees, supervisors, and all other employees as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By failing and refusing on July 24, and thereafter, to recognize and bargain wth the Union as the exclusive bargaining representative of Respondent's employees in the above-described appropriate unit and by failing to honor and adopt and enforce the existing contract between Wackenhut and the Union, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. By assisting AFG in obtaining representation among its employees and by recognizing AFG as the exclusive bargaining representative of its employees at a time when AFG did not represent an uncoerced majority of Respondent's employees, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (2) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1), (2), and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent be ordered to withdraw and withhold recognition from AFG unless

and until that union is certified, in order to enable its employees to exercise their statutory rights free from the unfair labor practices engaged in by Respondent.

It has been found that the Union is the certified bargaining representative of Respondent's employees in an appropriate unit and requested recognition and bargaining, the same being unlawfully refused, I shall recommend that Respondent bargain, upon request, with the Union and, if any understanding is reached, embody such understanding in a signed agreement. It has further been found that there is in existence a contract between Respondent, as successor to Wackenhut, and the Union. I shall recommend that Respondent honor, adopt and enforce that contract. I shall also recommend that Respondent give retroactive effect to all the clauses of the contract and make whole, with 6 percent interest, employees for any losses suffered by reason of Respondent's refusal to adopt, honor and enforce the agreement.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record herein, it is recommended that Respondent, its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively, upon request, with the Union as the exclusive bargaining representative of its employees in the above-described unit.

(b) Refusing to adopt, honor and enforce its contract with the Union, as successor of Wackenhut.

(c) Assisting or recognizing AFG as the representative of its employees for the purposes of collective bar-

gaining, unless and until said labor organization shall have been certified as the exclusive bargaining representative of said employees in an appropriate unit.

(d) Interfering with representation of its employees through labor organizations of their own choosing.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to join or assist the Union or otherwise engage in activities protected by the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Withdraw and withhold recognition from AFG until or unless it is certified as bargaining representative of Respondent's employees in an appropriate unit.

(b) Bargain collectively, upon request, with the Union and, if any understanding is reached, embody such understanding in a signed agreement.

(c) Honor, adopt and enforce the contract between Respondent, as successor to Wackenhut, and the Union and give retroactive effect to all the clauses of said contract and, with interest of 6 percent, make whole its employees for any losses suffered by reason of Respondent's refusal to honor, adopt and enforce said contract.

(d) Post at its Lockheed, Ontario, California, operations copies of the notice attached hereto as "Appendix."[6] Copies of said notice, to be furnished by the

[6]In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

Regional Director for Region 31, shall after being signed by Respondent's authorized representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by any other material.

(e) Notify said Regional Director, in writing, within 20 days from the date of the receipt of this Recommended Order what steps Respondent has taken to comply herewith.[7]

Dated: June 4, 1968.

/s/ E. Don Wilson
E. Don Wilson
Trial Examiner

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[7]In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act (as Amended), we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively, upon request, with International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 as the exclusive bargaining representative of our employees in the following appropriate unit:

> All our full-time and regular part-time employees performing plant protection duties as determined by Section 9(b)(3) of the National Labor Relations Act, at Lockheed, Ontario International Airport; excluding office clerical employees, supervisors, and all other employees as defined in the Act.

WE WILL NOT refuse to adopt, honor and enforce our contract, as successor of Wackenhut, with the above-named Union and covering the above-described unit.

WE WILL NOT assist or recognize American Federation of Guards, Local 1, as the representative of our employees for the purposes of collective bargaining, unless and until it shall have been certified as the exclusive bargaining representative of our employees in the above unit.

WE WILL NOT interfere with representation of our employees through labor organizations of their own choosing.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights to join or assist the United Plant Guard Workers or otherwise engage in activities protected by the Act.

WE WILL withdraw and withhold recognition from American Federation of Guards until or unless it is certified as bargaining representative of our employees in an appropriate unit.

WE WILL bargain, upon request, with United Plant Guard Workers and, if any understanding is reached, embody such understanding in a signed agreement.

WE WILL, as successor to Wackenhut, honor, adopt and enforce our collective-bargaining contract with United Plant Guard Workers and give retroactive effect to all clauses of said contract and, with interest at 6 percent, make whole our employees for any losses suffered by reason of our refusal to honor, adopt and enforce said contract.

THE WILLIAM J. BURNS
INTERNATIONAL DETECTIVE
AGENCY, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 10th Floor, Bartlett Building, 215 West Seventh Street, Los Angeles, California, 90014, Telephone No. 688-5850.

APPENDIX D.

Order Extending Time to File Petition for Writ of Certiorari.

Supreme Court of the United States, No. A-57, October Term, 1971.

Burns International Security Services, Inc., Petitioner v. National Labor Relations Board, et. al.

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IT ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 16, 1971.

/s/ John M. Harlan
Associate Justice of the Supreme
Court of the United States

Dated this 17th day of July, 1971.

APPENDIX E.

Statutes Involved.

Sections 8, 9 and 10 of the Labor Management Relations Act, 1947, as amended (hereinafter the "Act"), 29 U.S.C. Sections 158, 159 and 160 provide in relevant part:

"Sec. 8 (a) It shall be an unfair labor practice for an employer—.

". . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

". . .

"Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees . . .

". . .

"Sec. 10 (f) Any person aggrieved by a final order of the Board . . . may obtain a review of such order in any circuit court of appeals of the United States . . . wherein such person . . . transacts business . . . by filing . . . a written petition praying that the order of the Board be modified or set aside . . . the court shall . . . enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

Section 7 of the Administrative Procedure Act, 5 U.S.C. Section 557 (c) provides in relevant part:

> "All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—
>
> "(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . ."

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-123

Supreme Court, U.S.
FILED
SEP
E. ROBERT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., *et al.*,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION.

CHARLES G. BAKALY, JR.,
SEYMOUR SWERDLOW,
Counsel for Respondent.

Of Counsel:
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Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-123

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., *et al.*,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent is the Petitioner in *Burns International Security Services, Inc. v. NLRB*, Docket No. 71-198 (filed on August 9, 1971),* wherein it seeks a writ of certiorari to review a portion of the Judgment of the United States Court of Appeals for the Second Circuit which is not covered by the instant petition.

Opinions Below.

The opinion of the court of appeals** is not yet reported. The decision and order of the National Labor Relations Board (herein the "Board") are reported at 182 NLRB No. 50.***

*After the court of appeals had rendered its decision, Respondent changed its name to "Burns International Security Services, Inc." from "The William J. Burns International Detective Agency, Inc."

**Petition pp. 15-23. "Petition 15-23" refers to pages 15-23 of the Petition for Certiorari. Similar designations will be used herein.

***Petition pp. 25-37.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented.

Does the refusal of a sub-contractor, which is held to be a successor, to adopt, honor and enforce a collective bargaining agreement between the previous sub-contractor and the union representing the previous sub-contractor's employees constitute an unfair labor practice under the provisions of Sections 8(a)(5) and 8(d) of the Act, where there have been no dealings between the two sub-contractors, and the successor sub-contractor has not consented to be bound by said agreement and was not a party to the negotiation thereof either by an agent or an alter ego?

Statutes Involved.

The relevant provisions of the Labor Management Relations Act, 1947, as amended (herein the "Act"), 29 U.S.C. 151, *et seq.* (1964), are set forth in the Petition.*

Additional Statement.

Petitioner's statement (Petition p. 2, *et seq.*) is generally accurate but requires some amplification.

At different periods of time, plant protection services at a facility of Lockheed Aircraft Service Company (herein the "Facility") were rendered by The Wackenhut Corporation and Respondent. (See Petition pp. 2-3.) Lockheed was a prime Government contractor. Employees of Wackenhut and Respondent needed top-secret security clearances at the Facility because of Lockheed's Government contracts.

*Petition pp. 58-60.

Wackenhut's performance at the Facility had been part of its operations in California, which consisted of between 200 and 300 plant protection contracts. Respondent did not take over Wackenhut's other contracts. There were no dealings between Respondent and Wackenhut. All business dealings were between Respondent and Lockheed, or Wackenhut and Lockheed. Respondent did not acquire Wackenhut's assets, records, books, supplies or uniforms. Respondent's performance at the Facility was integrated into the operation of its existing nationwide organization. The work at the Facility was part of Respondent's Pacific Division, Los Angeles Branch and Ontario Sub-Office. The Ontario Sub-Office administered 30 contracts in addition to the Facility contract.

Respondent's operation within the Ontario Sub-office area* was highly centralized and integrated. Uniform policies and practices existed with respect to labor relations, personnel matters, employment and training of guards. Except for a single job supervisor, Respondent's guards at the Facility had common supervision with guards performing at Respondent's other jobs in the Ontario Sub-Office area. It was Respondent's practice to interchange guards, both temporarily and permanently, on a daily basis. Such interchange had a direct impact on the Facility work force. Initially, Respondent employed 42 guards at the Facility, 27 of whom were former Wackenhut guards, and 15 of whom were Respondent's guards who had been transferred thereto from Respondent's

*As used herein the term "Ontario Sub-Office area" shall refer to the area supervised through the Ontario Sub-Office excluding Los Angeles County. Respondent's guards in Los Angeles County were represented by the American Federation of Guards.

other jobs. Within six months after Respondent replaced Wackenhut, former Wackenhut guards constituted less than a majority of the guards at the Facility, as a result of the transfer of guards from Respondent's other jobs and new hires.

In the instant case, the Board, for the first time, held that a sub-contractor, found to be a successor, was bound by the agreement between the previous sub-contractor and the union representing the previous sub-contractor's employees. Previously, the Board had held that a successor was not bound by its predecessor's collective bargaining agreement unless it expressly assumed said agreement. *Rohlik, Inc.*, 145 NLRB 1236, 1242 n. 15 (1964). In changing its prior holdings, the Board relied upon this Courts' decision in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). However, even though the Board's decision was rendered after this Court's decision in *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970), said decision was not mentioned by the Board.

The court of appeals, in an opinion by Circuit Judge Paul R. Hays, relied upon *H. K. Porter* and refused to enforce that portion of the Board's order requiring Respondent to adopt, honor and enforce the agreement between Wackenhut and International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 (herein the "Wackenhut agreement"), holding that, "Neither the applicable case law nor the national labor policy justifies the Board in imposing a collective agreement upon an unwilling party who had no part in the negotiation of the agreement." (Petition p. 21.)

REASONS FOR DENYING THE WRIT.

1. The court of appeals correctly denied enforcement of the portion of the Board's order requiring Respondent to adopt, honor and enforce the Wackenhut agreement.

The Board's decision that Respondent must adopt, honor and enforce the Wackenhut agreement is in violation of Section 8(d) of the Act. In addition, as the court of appeals stated:

> "The action of the Board in this case is contrary to the letter as well as the spirit of the Supreme Court's recent decision in *H. K. Porter Co., Inc. v. National Labor Relations Board*, 397 U.S. 99 (1970). . . ." (Petition p. 21.)*

Section 8(d), which provides that the statutory duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession," was added to the Act in 1947.**

---

*Cases upholding the Board's power to order an employer to execute an agreement negotiated on his behalf by an agent, an *alter ego*, or a multi-employer association in the absence of a timely withdrawal, are inapposite. See *NLRB v. Strong*, 393 U.S. 357 (1969); *Retail Clerks v. NLRB*, 373 F.2d 655 (D.C. Cir. 1967); *Oilfield Maintenance Co.*, 142 NLRB 1384 (1963). In these cases, the employer consented to be bound to the agreement, and all that remained was the formal execution. It has never been contended that Wackenhut was Respondent's *alter ego* or agent.

**At that time, Congress rejected a proposed addition to the Act which would have made it an unfair labor practice for an employer:

> "[T]o violate the terms of a collective-bargaining agreement. . . ."

S. 1126, As Reported, 1 Legislative History of the Labor Management Relations Act 99, 111 (herein the "Legis. Hist. LMRA"), and in the House version as passed by the Senate, H.R. 3020, As Passed Senate, 1 Legis. Hist. LMRA 226, 239.

In *H. K. Porter,* this Court reviewed the history of the Act and stated:

> "The object of . . . [the Act] was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement. This fundamental limitation was made abundantly clear in the legislative reports accompanying the 1935 Act. The Senate Committee on Education and Labor stated:
>
> > 'The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.' " (397 U.S. at 103-04.)

This Court, specifically referring to Section 8(d), further stated:

> "The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions." (*Id.* at 103.)

In *H. K. Porter*, the Board had held the employer had violated Section 8(a)(5) of the Act by adamantly refusing to agree to a dues checkoff provision, intending thereby to frustrate the consummation of a collective bargaining agreement. The Board ordered the employer to agree to said provision. This Court, while agreeing that the employer had not bargained in good faith, held that because of Section 8(d) and the legislative history of the Act:

> "[W]hile the Board does have the power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." (*Id.* at 102.)*

Since the Board lacks the power to order agreement to, or compliance with, a specific provision of a collective bargaining agreement, and since the Board lacks

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*Even before *H. K. Porter*, this Court in *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952) noted:

> "[T]hat the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."

Accord, *Teamsters, Local 357 v. NLRB*, 365 U.S. 667, 676-77 (1961); *Steelworkers v. NLRB*, 390 F.2d 846, 853 (D.C. Cir.), *cert. denied*, 391 U.S. 904 (1968); *Retail Clerks v. NLRB*, 373 F.2d 655 (D.C. Cir. 1967); *Siskin Steel and Supply Co.*, 160 NLRB 1038, 1040 (1966); *Hyde's Super Market*, 145 NLRB 1252, 1253 (1964); *United Telephone Co. of the West*, 112 NLRB 779, 782 (1955).

the power to order the making or dropping of a specific proposal, it follows that the Board lacks the power to order agreement to or compliance with an entire collective bargaining agreement.

The Board incorrectly relied upon this Court's decision in *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964), as authority to overcome Section 8(d), the legislative history of the Act, the cases cited above, and its own prior decisions.* *Wiley* was an action under Section 301 of the Act to compel arbitration. The question before this Court, relevant hereto was:

> ". . . [W]hether a corporate employer must *arbitrate* with a union under a bargaining agreement between the union and another corporation which has merged with the employer. . . ." (376 U.S. at 544.)** (Emphasis added.)

In *Wiley,* this Court's limited holding on said question was that under Section 301, a successor employer must arbitrate grievances under its predecessor's collective bargaining agreement. Such holding did not concern the portions of the Act related to unfair labor practices which are determinative herein. Indeed, all relevant cases cited by this Court in *Wiley* with respect to the issue of successor's duty to arbitrate arose under Section 301.

Wiley is one of the cases evolving from this Court's decision in *Textile Workers v. Lincoln Mills, Inc.,* 353 U.S. 448 (1957), where it was held that the agreement to arbitrate contained in a collective bargaining agree-

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*See *Rohlik, Inc.*, 145 NLRB 1236, 1242 n. 15 (1964).

**The other question before the Court concerned procedural arbitrability.

ment was specifically enforceable in federal courts. Since *Lincoln Mills*, this Court has underscored the importance of arbitration as a means of resolving industrial disputes.* These cases hold that under Section 301 disputes must be submitted to arbitration whenever there is any reasonable basis for so doing. In *Wiley*, this Court held that the relationship between a successor and predecessor was a sufficient nexus for referring a case to arbitration. However, the Court specifically refrained from holding that a successor is bound by its predecessor's collective bargaining agreement even though urged to do so.**

The court of appeals below, in rejecting the Board's contention that *Wiley* supported its holding herein, correctly noted the distinctions between an action under Section 301 to compel arbitration such as *Wiley*, and an unfair labor practice proceeding. The court of appeals stated:

> ". . . [T]he policy behind the decision in *Wiley* was founded upon the Court's recognition of 'the central role of arbitration in effectuating national labor policy.' . . . The Court's determination is only that 'the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed.' . . ." (footnote omitted) (Petition pp. 22-23.)

**United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960).

***Brief for American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae at 8-22, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

The Board failed to recognize that when a court is functioning under Section 301, there are no statutory limitations on its power such as those contained in Section 8(d). However, in an unfair labor practice case, Section 8(d) and the legislative history of the Act are express limitations on the power of courts and the Board to order a non-consenting party to adopt, honor and enforce a collective bargaining agreement.

The interaction of Section 301 and other portions of the Act was considered by this Court in *NLRB v. Strong*, 393 U.S. 357 (1969). In *Strong*, the employer, who was contesting a Board order that required him to pay fringe benefits under a collective bargaining agreement, argued that the same proscriptions on courts under Section 301 applied to the Board; and therefore, an arbitrator—and not the Board—should determine what fringe benefits were due under the agreement. However, the Court held that in view of the Board's express powers under Sections 10(a) and (c) of the Act, the Board, unlike a court, was not required to defer to arbitration and could order the payment of fringe benefits. Similarly, as the court of appeals noted, in the instant case, Section 8(d) precluded the Board's expansion of the principles under Section 301 which were expressed in *Wiley*. Therefore, as the employer in *Strong* could not rely on cases decided under Section 301, the Board in the instant case cannot rely on *Wiley* to justify its holding that Respondent's refusal to adopt, honor and enforce the Wackenhut agreement was an unfair labor practice.

The stated purpose of the Board's decision herein is to promote industrial peace. However, the Board has completely ignored the policy of the Act which

encourages parties to negotiate and reach agreements which are mutually acceptable. The court of appeals found that the Board's rule of forced contracts is undesirable. It stated:

> ". . . [T]he rule would bind the union to a contract with a successor employer without giving it any opportunity for choice. This could sometimes result in serious inequities. For example, where a union made substantial concessions to a failing employer in order to keep him in business and then discovered that the successor was a strong, financially viable organization, it would have no chance to bargain anew. The Board's holding that it will consider 'unusual circumstances,' (see, e.g., *Emerald Maintenance, Inc.*, 188 N.L.R.B. No. 139 (1971) where the Board, citing 'unusual circumstances,' refused to apply the rule it had earlier laid down in *Burns*) is no answer since it merely arrogates to the Board the additional power to pick and choose among the contractual provisions it will impose on non-contracting parties." (Petition p. 23.)

Contrary to Petitioner's contention (Petition p. 10), the court of appeals decision on the contract issue is not in conflict with *United States Gypsum Co. v. United Steel Workers*, 384 F.2d 38 (5th Cir. 1967), *cert. denied*, 389 U.S. 1042 (1968); *United Steelworkers v. Reliance Universal, Inc.*, 335 F. 2d 891 (3rd Cir. 1964); and *Wackenhut Corp. v. United Plant Guard Workers*, 332 F. 2d 954 (9th Cir. 1964). As with *Wiley*, all of the foregoing decisions were rendered under Section 301, in actions brought to compel arbitration. The courts of appeals did not in those cases consider Section 8(d) and the legislative history of the Act referred to herein.

While the court of appeals in *Ranch-Way, Inc. v. NLRB*, ... F.2d .... (10th Cir. 1971) (Petition pp. 61-64) held that a successor is bound by its predecessor's collective bargaining agreement, the court in its decision did not mention Section 8(d), the legislative history of the Act or the decisions of this Court in *Wiley* and *H. K. Porter*. Further, even though the decision in *Ranch-Way* was rendered after the court of appeals decision below, said decision was not mentioned in *Ranch-Way*.

It is submitted that the court of appeals decision in the instant case on the issue of contract survival is correct. Accordingly, this Court should deny the writ.

2. The question presented herein is not ripe for consideration by this Court.

Respondent in its petition* has argued that the Board's order should not be enforced because of the Board's failure to articulate reasons for holding that a unit of Respondent's guards at the Facility was appropriate. Respondent urged that based on *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965), this case should be remanded to the Board. Respondent has also argued that even if the Facility unit was appropriate, Respondent was not Wackenhut's successor. The validity of the Board's order that Respondent adopt, honor and enforce the Wackenhut agreement is in issue only if the Board's bargaining unit and successorship determinations are proper. Therefore, the question presented herein will not be reached if this Court acts favorably on the questions presented in Respondent's petition.

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*See petition in *Burns International Security Services, Inc. v. NLRB*, Docket No. 71-198, filed August 9, 1971.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES G. BAKALY, JR.,
SEYMOUR SWERDLOW,
Counsel for Respondent.

Of Counsel:
O'MELVENY & MYERS,

Dated: September 8, 1971.

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FILED
SEP 23 1971
E. ROBERT SEAVER, CLERK

No. 71-198

In the Supreme Court of the United States

OCTOBER TERM, 1971

BURNS INTERNATIONAL SECURITY SERVICES, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-198

BURNS INTERNATIONAL SECURITY SERVICES, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. The Board found, *inter alia,* that petitioner Burns was a successor employer to Wackenhut, and thus violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to recognize and bargain with the United Plant Guard Workers of America, which had been certified by the Board as the representative of a separate unit of guards at the Lockheed facility in Ontario, California. The Board further found that Burns violated the same provisions of the Act by failing to honor the contract between Wackenhut and the Union (182 NLRB No. 50, Pet.

App. 9–40). The court of appeals sustained the Board's first finding and enforced the portion of its order relating thereto, but declined to enforce the portion of its order requiring that the contract be honored (Pet. App. 1–8). The Board has filed a petition for a writ of certiorari to review the latter ruling. *National Labor Relations Board* v. *The William J. Burns, International Detective Agency, Inc., et al.*, No. 71–123, 1971 Term.[1] By the present petition, Burns seeks review of the court's other ruling.

2. Burns' petition raises two questions, neither of which warrants review by this Court.

a. Burns challenges the propriety of the Board's determination that a separate unit of guards is appropriate for collective bargaining at the Lockheed facility. The Board, however, has wide discretion in making unit determinations (see *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491), and the court below correctly held (Pet. App. 3–4) that the Board had not abused that discretion here.[2]

---

[1] Burns has changed its name to Burns International Security Services, Inc. (Pet. in No. 71–198, p. 1, fn.).

[2] In the consent election agreement leading to the Union's certification, Wackenhut had stipulated that a unit confined to its plant-protection employees at the Lockheed facility was appropriate for collective bargaining purposes (Pet. App. 25, 32). After Burns took over the work, the guards at that facility remained an identifiable and distinct group, working in the same clearly defined geographic area, physically separated from their employer's other guards (Pet. App. 30; R. 22–24, 29, 40, 43–44). ("R." refers to the appendix to the briefs in the court below.) As under Wackenhut, the employees continued to be

National Labor Relations Board v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (Pet. 7), is distinguishable. The Court's conclusion that the Board had not sufficiently articulated the basis for its unit determination was prompted by the fact that the determination appeared to be inconsistent with determinations in similar cases. *Id.* at 442. No such inconsistency appears here.[3]

b. Burns also challenges the propriety of the Board's finding that Burns is a "successor" to Wackenhut. This presents essentially an evidentiary issue, which likewise does not warrent further review. Moreover, as the court of appeals correctly concluded (Pet. App. 5): "All of the important factors which the Board has used and the courts have approved are present in the instant case: 'continuation of the same types of product lines, departmental organization, employee identity and job functions.'" Both Burns and

directly supervised by a single supervisor, who had authority with respect to hiring and discharge and was required by Lockheed's contract to devote full time to his supervisory work there (R. 68–72, 98–99). The former Wackenhut guards, as a result of their prior bargaining history, were paid more than the other Burns employees in the area (R. 45–46, 99–100, 120–121). Finally, Burns unlawfully assisted the American Federation of Guards, Local 1, in organizing the guards at the Lockheed facility, and then recognized the AFG as the bargaining representative of such guards on the basis of a majority card showing in the separate Lockheed unit (Pet. App. 2, 12, 26–30, 32; R. 7–22, 25–29, 30–43, 46–50, 109–113).

[3] See, *e.g.*, *The William J. Burns International Detective Agency, Inc.*, 137 NLRB 1235, 1237; *Burns Detective Agency*, 110 NLRB 995, 996; *William J. Burns Detective Agency*, 47 NLRB 610, 612.

Wackenhut are nationwide organizations (Pet. App. 23; R. 57–58, 86–88); both performed the identical services at the same facility (Pet. App. 11, 30; R. 22–24, 29, 40, 43–44); the functions and responsibilities of Burns' supervisors were similar to those of their predecessors (R. 64–66, 68, 70–71, 98–99); and Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42 (Pet. App. 11–12, 26).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1971.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-123 and 71-198

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
BURNS INTERNATIONAL SECURITY SERVICES INC., INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA and its AMALGAMATED LOCAL UNION NO. 162,
Respondents.

— — —

BURNS INTERNATIONAL SECURITY SERVICES, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA and its AMALGAMATED LOCAL UNION NO. 162,
Respondents.

BRIEF FOR INTERNATIONAL UNION, UPGWA, RESPONDENT AND INTERVENOR

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Respondents.

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BURNS INTERNATIONAL SECURITY SERVICES, INC.,
Petitioner,
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NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA and its AMALGAMATED LOCAL UNION NO. 162,
Respondents.

BRIEF FOR INTERNATIONAL UNION, UPGWA, RESPONDENT AND INTERVENOR

The International Union, United Plant Guard Workers of America (UPGWA) and its Amalgamated Local Union No. 162 (herein the "Union") was the Charging Party in all proceedings before the National Labor Relations

Board (herein the "Board"); the Intervenor before the United States Court of Appeals for the Second Circuit; and the Respondent in the instant cases brought by the Board and Burns International Security Services, Inc., (herein "Burns").*

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 411 F. 2d 911 (2nd Cir. 1971) (App. 185). The Decision and Order of the Board are reported at 182 NLRB No. 50 (App. 3).

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1971, and was amended on July 12, 1971 (App. 198). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix D of the Board's Petition for a Writ of Certiorari.

---

* The Union participated fully in all proceedings before the Board, including oral argument, and filed its brief and engaged in oral argument before the Court of Appeals. Albeit relying upon the Board to file a petition for Writ of Certiorari, the Union has a compelling interest in this Court's decision on the merits.

QUESTIONS PRESENTED

1. Whether a successor-employer violates Section 8 (a) (5) and Section 8 (d) of the Labor Management Relations Act by refusing to adopt and honor the outstanding collective bargaining agreement.

2. In such a proceeding, may a sub-contractor who is awarded a contract to provide services at a facility be held to be a successor of the previous sub-contractor and required to bargain with the Union representing the previous sub-contractor's employees, where: (a) there is a total absence of dealings between the two sub-contractors; (b) the previous sub-contractor's performance at the facility constitutes a small portion of its total business, the balance of which was not affected by the change of sub-contractors; (c) the performance of the contract is integrated into the new sub-contractor's previously existing business; (d) there is a change in supervision at the facility by the new sub-contractor; and (e) within six months after the awarding of the contract the previous sub-contractor's employees constitute less than a majority of employees at the facility?

STATEMENT OF THE CASE

The Union is an international union composed exclusively of guard employees located throughout the United States, Canada and Puerto Rico. It currently has a membership of approximately 20,000, one-fourth of which is employed by contract guard agencies such as Burns. Since it founding in 1948, the Union has experienced numerous disruptions in bargaining and contract relationships as the result

of contract guard agency successors. The instant case presents a classic example of the problem. Thus, the Union, collectively and its members individually, have a compelling interest in the enforcement of the Board's Order herein that Burns adopt and honor its predecessors bargaining agreement.

From 1962 until July 1, 1967, the Wackenhut Corporation provided guard services on a contract basis for Lockheed Aircraft Service Company (herein "Lockheed") at Ontario International Airport in California (App. 145). On March 8, 1967, the Board certified the Union as the exclusive bargaining representative of Wackenhut's guard employees performing services for Lockheed at the airport (App. 146).

After collective bargaining, Wackenhut and the Union entered into a three-year collective bargaining agreement on April 29, 1967 (App. 148-173).

Pursuant to its agreement with Wackenhut, Lockheed advertised for guard service contractors to bid for the contract (App. 145). On May 15, 1967, Burns and other potential bidders were advised at a conference called by Lockheed that Wackenhut guards were represented by the Union; that a bargaining agreement was in existence between Wackenhut and the Union; and that the Union had been certified by the Board in a recent election (App. 126). Burns was the successful bidder for contract guard services limited to Lockheed facilities at the airport (App. 145-146).

Prior to its July 1, 1967 takeover of guard operations at Lockheed, Burns began interviewing guards who were then employed by Wackenhut and represented by the Union. Burns intended to employ as many Wackenhut guards as possible who had secret or top secret government security clearances (App. 106).

Beginning on July 1, 1967, Burns provided protection services at Lockheed with 42 guards, 27 of whom were former Wackenhut guards. Guard duties and posts were basically unchanged as the result of Burns takeover from Wackenhut. Moreover, Burns adjusted wage rates retroactively to July 6, 1967, "Because when we took over the contract, we decided that we would not allow the employees to lose anything on their present wages" (App. 108).

By letter dated July 12, 1967, the Union demanded that Burns recognize it ". . . as the exclusive representative of all guard employees in the appropriate unit at Lockheed Aircraft Service Company [and] that you honor the collective bargaining agreement" (App. 174-175).

Burns replied to this demand by letter dated July 24, 1967, stating that:

> "The matter is being reviewed but I would understand that any guards employed by our Los Angeles office at Lockheed Aircraft Service Company in Ontario, California, are members of and are represented by American Federation of Guards, Local 1, a union with whom our Los Angeles office now has a collective bargaining agreement and has had over a period of years. There is, accordingly, a substantial good faith doubt here that your claim is valid" (App. 176).

Burns' refusal to bargain and honor the bargaining agreement caused the Union to file an unfair labor practice charge with the Board on July 24, 1967, and an amended charge on August 1, 1967 (App. 1).

In its Decision and Order dated May 7, 1970, the Board found that Burns was a successor employer to Wackenhut and therefore obligated by Sections 8 (a) (1) and (5) of the Act to recognize and bargain with the Union. The

Board also held (with Member Jenkins dissenting), that Burns, as a successor, was obligated to adopt and honor the collective bargaining agreement between Wackenhut and the Union, and that its failure to do so further violated Sections 8 (a) (1) and (5) of the Act (App. 3-13).

On petitions for review and enforcement, the Court of Appeals sustained the Board's findings that Burns was a successor employer to Wackenhut and, therefore, required to recognize and bargain with the Union (App. 188-189). It rejected, however, that portion of the Board's Order which required Burns to adopt and honor the bargaining agreement between Wackenhut and the Union (App. 190-192).

By Order dated October 12, 1971, this Court granted review of the judgment of the Court of Appeals, insofar as it declined to enforce the Board's Order requiring Burns to adopt and honor the bargaining agreement between its predecessor and the Union. Review was also granted as to that portion of Burns' petition for a Writ of Certiorari which raised questions as to the status of a sub-contractor in successor cases (App. 199-200).

ARGUMENT

I.

AS A SUCCESSOR-EMPLOYER, BURNS IS REQUIRED BY SECTIONS 8 (a) (1) AND (5) AND SECTION 8 (d) OF THE ACT TO ADOPT AND HONOR THE UNION'S BARGAINING AGREEMENT.

The Court of Appeals and the Board correctly held on the basis of substantial precedent that Burns was a successor employer to Wackenhut and therefore required to recognize and bargain with the Union. *Tom-A-Hawk Transit, Inc. v. NLRB,* 419 F. 2d 1025 (7th Cir. 1969); *NLRB v. Zayre Corp.,* 424 F. 2d 1159 (5th Cir. 1970); *NLRB v. Auto Ventshade, Inc.,* 276 F. 2d 303 (5th Cir. 1960); and *Overnite Transportation Co. v. NLRB,* 372 F. 2d 765 (4th Cir. 1967), cert. denied, 389 U.S. 838.

Burns' duty to bargain included the obligation to maintain existing terms and conditions of employment, whether or not those terms and conditions were established by a bargaining agreement. *Overnite Transportation, supra;* and *Makela Welding, Inc., v. NLRB,* 387 F. 2d 40 (6th Cir. 1967). In this respect the Court below entered an amended judgment that Burns make whole all employees for any loss of pay or other benefits suffered as a result of unilateral changes in working conditions (App. 198). Moreover, if Wackenhut had violated its bargaining obligations to the Union, Burns would be under an obligation to remedy such violations. *Perma Vinyl Corp.,* 164 NLRB 968 (1967).

Thus, in almost all essential aspects of a bargaining relationship the Board, with Court approval, has held that a successor employer is bound by the obligations of its predecessor. While it is true that the breach of a contract is not *per se* unfair labor practice, the Board may interpret

and give effect to the terms of a bargaining agreement when necessary to adjudicate an unfair labor practice and to remedy unfair labor practices which also constitute a breach of contract. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967) and *Smith v. Evening News Association*, 371 U.S. 195 (1962). To this end, the Board has prohibited unilateral modifications or repudiation of bargaining agreements during their terms. *NLRB v. Hyde*, 339 F. 2d 568 (9th Cir. 1964); *NLRB v. Huttig Sash & Door Co.*, 377 F. 2d 964 (8th Cir. 1967).

Prior to the instant case, however, and those consolidated with it, the Board declined to hold that an unconsenting successor had a statutory duty to adopt and honor its predecessor's bargaining agreement with the incumbent union. Direction to change that policy came with decisions of this Court declaring that the principal objective of the national labor policy is the preservation of industrial peace through the encouragement and maintenance of stable bargaining relationships. *United Steelworkers v. Warrior and Gulf Nav. Co.*, 363 U.S. 574 (1960); *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1961).

Additional guidance for the maintenance of a stable and uniform national labor policy was provided by the Court in its landmark decision in *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964). Speaking for a unanimous Court, Mr. Justice Harlan held:

> "While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, *a collective bargaining agreement* is not an ordinary contract. '. . . *It is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate* . . .' The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular

> industry or of a particular plant.' *Warrior & Gulf, supra,* 363 U.S. at 578-479. *Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated* both by circumstances, [See id, at 580] and *by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship.* Therefore, although the duty to arbitrate, as we have said, *supra,* . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessary, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy." (376 U.S. at 549-550.) (Emphasis added, footnotes omitted.)

Interpreting and applying the rule in *Wiley,* the Court held in *Wackenhut Corporation v. International Union, United Plant Guard Workers of America,* 332 F. 2d 954 (9th Cir. 1964) that:

> "The specific rule we derive from *Wiley* is that where there is substantial similarity of operation and continuity of identity of the business enterprise before and after a change in ownership, a collective bargaining agreement . . . entered into by a predecessor employer is binding upon the successor employer." (332 F. 2d at 958.)

Accord: *United Steelworkers v. Reliance Universal, Inc.,* 335 F. 2d 891 (3rd Cir. 1964); *United States Gypsum Co. v. United Steelworkers,* 384 F. 2d 38 (5th Cir. 1967), cert. denied, 389 U.S. 1042; *Monroe Sander Corp. v. Livingston,* 377 F. 2d 6 (2nd Cir. 1967), cert. denied, 389 U.S. 831.

On the basis of successor-employer rules expressed by the Board prior to the instant *Burns* case, and as clarified by this Court in *Wiley,* it is clear that the tests for determining a successor's obligations under either the Act or an existing bargaining agreement are virtually identical. The rationale for both tests is to promote industrial stability and substitute the collective bargaining process in all its aspects for economic warfare.

Since both the Board and federal courts are charged with the responsibility of interpreting and enforcing a single labor act, and of fashioning a uniform body of federal labor law, it follows that where an employer takes over an operation under conditions rendering him a successor, he is required to recognize and bargain with the incumbent union and to honor any lawful bargaining agreement then in effect. To hold otherwise would negate the federal policy of a uniform labor law and permit a "successor-employer" (who, after all, stands in the shoes of his predecessor) to destroy the maintenance of stable bargaining relationships and industrial peace which the Act intended to preserve and promote.

Whether or not a bargaining agreement contains a compulsory arbitration clause, it should be honored by the successor-employer since it establishes current terms and conditions of employment pending notice and bargaining as required by Sections 8 (a) (5) and 8 (d) of the Act, and, if arbitration is available, a means to resolve employee disputes which might otherwise wholly disrupt industrial stability.

Subsequent to the decision of the Second Circuit below (April 26, 1971), the Tenth Circuit held in *Ranch-Way, Inc., v. NLRB,* No. 368-70, decided June 24, 1971 (10th Cir. 1971) that a successor-employer "is bound by the collective

bargaining provisions of an agreement between its predecessor and a union". Albeit the court spoke of ". . . a lock, stock and barrel sale of a going concern, resulting in a substantial continuity of identity . . .", it clearly based its holding on the rationale expressed by this Court in *Wiley* and the Board in *Burns*.

Contrary to the Court below, the Board's action was not contrary to either the letter or spirit of this Court's decision in *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970). In *Porter*, the parties had never agreed upon a contract covering employees represented by the Union. By contrast, Burns, with full advance knowledge, elected to take over an employing industry without significant change, and retained a majority of employees who had only recently expressed their federally protected right to select a bargaining representative and to engage in collective bargaining leading to execution of a written contract. As surely as the employer in *Wiley* assumed traditional commercial obligations of its predecessor, Burns, by virtue of purchasing Wackenhut's account at Lockheed by bid and taking over the existing work force, assumed the bargaining agreement which its employees had negotiated for the employing industry.

II.

BURNS IS A SUCCESSOR-EMPLOYER TO THE PREVIOUS SUB-CONTRACTOR, WACKENHUT, AT THE LOCKHEED FACILITY.

Both the Board and Court below rejected Burns contention that its subcontractor status should alter its standing as a successor to Wackenhut. Its status as a nationwide contractor for guard services does not change the fact that it succeeded to the performance of security services only at the Lockheed facility. It employed a majority of the

predecessor's employees and performed security functions in the same manner, including the use of a former supervisor of Wackenhut. Changes in the operation regarded by Burns as significant, occurred after its takeover on July 1, 1967, and cannot be considered to affect its initial successor-employer status.

The Board has previously considered the lack of direct business contact between sub-contractors in a service industry who, by competitive bidding, succeed to an "employing industry". In *Maintenance, Inc.*, 148 NLRB 1299 1301 (1964), the Board stated:

> "It is true that in *Johnson Ready Mix*, unlike the instant case, the respondent company acquired by purchase certain physical assets of the company whose operations it took over. But, contrary to Trial Examiner, we do not view this as a substantial basis for distinction in applying the fundamental principle involved. The duty of an employer who has taken over an 'employing industry' to honor the employees' choice of a bargaining agent is not one that derives from a private contract, nor is it one that necessarily turns upon the acquisition of assets or assumption of other obligations usually incident to a sale, lease, or other arrangement between employers. It is a public obligation arising by operation of the Act. The critical question is not whether Respondent succeeded to White Castle's corporate identity or physical assets, but whether Respondent continued essentially the same operation, with substantially the same employee unit whose duly certified bargaining representative was entitled to statutory recognition at the time Respondent took over."

In *Maintenance*, the Board reflected the Court's earlier holding in *Wiley* that a bargaining agreement is "not an

ordinary contract" to be interpreted in accordance with commercial law principles. This Court stated:

> "It would derogate from 'the federal policy of settling labor disputes by arbitration,' *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established; this is so as much in cases like the present, where the contracting employer disappears into another by merger, as in those in which one owner replaces another but the business entity remains the same." (376 U.S. at 549.)

Thus, it is clear that a finding of successorship and attendant statutory obligations do not depend upon any particular business relationship between the successor and its predecessor. Of prime importance is succession to a "business entity" or "employing industry" where there is a continuing identity. To use the term of the Court in *Ranch-Way, supra,* Burns succeeded "lock, stock and barrel" to "a going concern". By bidding with Lockheed against Wackenhut, it effectively purchased Wackenhut's principal asset—a contract for guard services and trained employees who possessed necessary government security clearances. In the same context, it must be considered that the Union's certification from the Board and its collective bargaining agreement were assets to Burns in terms of securing industrial peace and stability.

If a successor to an "employing industry" has a public obligation to honor the employees' choice of a bargaining agent, it must necessarily follow under the rule of *Wiley* that the statutory obligation includes honoring the employees' bargaining agreement.

As found by the Board in the instant case, Burns' employees work in an industry in which the identity of their employer is subject to annual bidding. Their basic security is the bargaining agreement and unlike an employer they cannot readily adjust to changes in ownership of the employing industry.

Accordingly, the Union respectfully submits that in the interest of a uniform national labor policy, this Court should affirm the Board's ruling that a successor-employer is obligated by the Act to adopt and honor its predecessors bargaining agreement.

CONCLUSION

On the basis of the foregoing and the entire record, it is respectfully submitted that the Board's Order must be enforced in full.

Respectfully submitted,

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November 18, 1971

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v.

BURNS INTERNATIONAL SECURITY SERVICES, INC., ET AL.

BURNS INTERNATIONAL SECURITY SERVICES, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-123

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BURNS INTERNATIONAL SECURITY SERVICES, INC., ET AL.

No. 71-198

BURNS INTERNATIONAL SECURITY SERVICES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (A. 185–192) is reported at 441 F. 2d 911. The decision and order of the National Labor Relations Board (A. 3–29) are reported at 182 NLRB No. 50.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1971, and was amended on July 12, 1971 (A. 193–198). The Board's petition for a writ of certiorari (No. 71–123) was filed on July 23, 1971, and Burns' petition (No. 71–198) was filed on August 9, 1971.[1] The petitions were granted on October 12, 1971 (A. 199–200).[2]

QUESTIONS PRESENTED

1. The question in No. 71–198 is whether the Board properly concluded that Burns was a successor to Wackenhut for purposes of the National Labor Relations Act, and is thus required to honor Wackenhut's obligation to bargain with the employees' union representative.

2. The question in No. 71–123 is whether a successor employer violates Section 8(a)(5) and Section 8(d) of the National Labor Relations Act by refusing to honor the outstanding collective bargaining agreement which its predecessor executed with the employees' union representative.

STATUTE INVOLVED

The relevant statutory provisions are set forth in the Appendix, *infra*, pp. 37–39.

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[1] On July 17, 1971, Mr. Justice Harlan extended Burns' time for filing a petition to and including August 16, 1971.

[2] With respect to Burns' petition, the grant of certiorari was limited to question 2, which contests the validity of the Board's successorship finding (A. 200).

STATEMENT

A. THE FACTS

The Wackenhut Corporation, a nationwide guard service firm, provided plant protection services for Lockheed Aircraft Service Company ("Lockheed") at Ontario International Airport in California between 1962 and July 1, 1967 (A. 4, 15, 16; 70–71, 76, 87–88, 145). On March 8, 1967, the Board certified the International Union, United Plant Guard Workers of America (the "Union") as the exclusive bargaining representative of Wackenhut's full-time and regular part-time employees performing plant protection duties for Lockheed at the airport (A. 4, 16–17; 146, 37). On April 29, 1967, Wackenhut and the Union entered into a three-year collective bargaining agreement, which contained a clause making the agreement binding on "successors and assigns" (A. 4, 17; 146, 148–173). The collective agreement provided for an immediate increase of 10 cents per hour in the wage rate of rank-and-file guards, and for additional 10-cent increases at specified future periods.[3]

Lockheed's contract with Wackenhut was for one year, with an expiration date of June 30, 1967 (A. 4, 17; 125, 128–134). In early 1967, Lockheed invited various guard services, including William J. Burns

[3] For example, the agreement provided that the starting hourly rate for such guards would go to $1.60 as of June 24, 1967, $1.70 as of April 26, 1968, and $1.80 as of April 26, 1969 (A. 165–166).

International Detective Agency, Inc. ("Burns")[4] to bid for the job then being done by Wackenhut (A. 4, 17; 127, 128, 130). Prior to making its bid, Burns was informed by Lockheed of the Union's certification and its April collective bargaining agreement with Wackenhut (A. 4–5, 17; 105, 126). Although Wackenhut submitted a bid, the successful bidder was Burns (A. 5, 15, 17; 127, 184, 105–106).

During June 1967, Burns assisted the American Federation of Guards, Local 1 ("AFG") in obtaining membership applications from Wackenhut guards who applied for jobs with Burns (A. 5–6, 17–21, 25; 40–49, 50–53, 57–59, 60–62, 64–66, 54–57, 103–104, 177). Some of these employees were advised that Burns "couldn't live with [the Union's] contract"; that they could not get uniforms without signing AFG applications; and that they had to join AFG in order to work for Burns (*e.g.*, A. 18–21). On June 29, Burns' branch manager, Ingle, concluded that a majority of the employees to be used at the Lockheed job had signed AFG applications and, accordingly, recognized the AFG as their bargaining representative (A. 5–6, 22; 101–103, 106, 123).

Burns officially began performing the guard services on July 1 (A. 5, 17; 145). On that date, Burns' Lockheed work force of 42 employees consisted of 27 guards who had formerly been employed by Wacken-

[4] After the court of appeals' decision, this corporation changed its name to "Burns International Security Services, Inc." Pet. in No. 71–198, p. 1, n.*.

hut and 15 guards who were transferred from other Burns jobs (A. 5, 17, 21; 146, 103).[5] The Burns guards performed basically the same services at the Lockheed facility that the Wackenhut guards had performed (A. 5, 17, 21; 49–50, 53, 59–60, 62, 125, 130, 136). Although Burns used its own supervisors, their functions and responsibilities were similar to those of their Wackenhut predecessors (A. 73–75, 92–93, 94–95).[6]

On July 12, the Union demanded that Burns recognize it as the bargaining representative of Burns' employees at Lockheed and honor the collective bargaining agreement between the Union and Wackenhut (A. 5, 22, 25; 146, 174–175). By letter of July 24, Burns declined to recognize the Union, because "any guards employed by our Los Angeles office at Lockheed * * * are members of and are represented by [AFG], a Union with whom our Los Angeles office now has a collective bargaining agreement and has had for over a period of years" (A. 5, 22, 25; 146, 176).

B. THE BOARD'S DECISION AND ORDER

The Board held that Burns violated Section 8(a)(2) and (1) of the Act by assisting AFG in organizing employees and by recognizing AFG when it did not represent an uncoerced majority of Burns' em-

[5] Wackenhut's work force on the Lockheed job had also consisted of about 42 guards (A. 76).

[6] Burns' job supervisor at Lockheed had worked for Wackenhut prior to the takeover (A. 94).

ployees (A. 5–6). The Board also found that a bargaining unit limited to Burns guards working for Lockheed was appropriate and that Burns was a successor employer to Wackenhut since it continued essentially the same operation (A. 5–6, 21). Accordingly, the Board held that Burns violated Section 8(a) (5) and (1) of the Act by refusing to recognize and bargain with the Union (A. 5–8). Finally, the Board (with Member Jenkins dissenting) held that, as a successor to Wackenhut, Burns was obligated to honor the contract between Wackenhut and the Union, and that, by failing to do so, Burns further violated Section 8(a) (5) and (1) of the Act (A. 6–11).

In deciding that Burns was bound by its predecessor's collective bargaining agreement, the Board relied principally on this Court's decision in *John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (A. 6–8). The Board also concluded that its decision effectuated the policies of the Act, particularly "Congress' recognition [in Section 8(d), *infra,* pp. 37–38] of the paramount role in maintaining industrial peace played by parties' adherence to existing collective-bargaining agreements" (A. 9–10).

The Board ordered Burns to cease and desist from its unfair labor practices; to withdraw and withhold recognition from the AFG unless and until it was certified by the Board; to bargain collectively with the Union on request; to honor, adopt, and enforce the contract between Wackenhut and the Union, to give it retroactive effect, and to make the employees whole for any

losses suffered by reason of Burns' refusal to honor the contract; and to post appropriate notices (A. 11, 25–29).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals sustained the Board's finding that Burns violated Section 8(a)(2) and (1) of the Act by unlawfully assisting and recognizing the AFG (A. 187–188). It also sustained the Board's finding that a bargaining unit limited to Burns guards working for Lockheed was appropriate (A. 188). In addition, it agreed with the Board that Burns was a successor employer to Wackenhut and, as such, was required to recognize the union chosen by Wackenhut's employees (A. 189).

The court held, however, that the Board had "exceeded its powers" in ordering Burns to honor the contract executed between Wackenhut and the Union, since "[n]either the applicable case law nor the national labor policy justifies the Board in imposing a collective agreement upon an unwilling party who had no part in the negotiation of the agreement" (A. 190). The court stated (A. 190):

> The action of the Board in this case is contrary to the letter as well as the spirit of the Supreme Court's recent decision in *H. K. Porter Co., Inc.* v. *National Labor Relations Board*, 397 U.S. 99 (1970). That case held that the Board and the courts "[are] without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement." *Id.*, at 102. * * *

Nor, in the court's view, did *Wiley, supra*, sanction such a requirement, for that case merely holds that "'in appropriate circumstances * * * the successor employer may be required to arbitrate with the union under the agreement'." (A. 191–192).

SUMMARY OF ARGUMENT

I

Where a transfer of operations leaves the identity of the employing enterprise substantially intact the original employer's duty to recognize and bargain with an incumbent union devolves upon the new employer as a "successor employer." Whether the employing enterprise remains substantially the same is determined by an evaluation of the total circumstances. As the court below correctly concluded (A. 189), "All of the important factors which the Board has used and the courts have approved [for finding successorship] are present in the instant case: 'continuation of the same type of product lines, departmental organization, employee identity and job functions.'" Thus (*ibid.*):

Accordingly, the court of appeals' judgment omits the requirement in the Board's order (A. 26–27) that Burns make the employees whole for any losses suffered by reason of its refusal to honor the contract (A. 193–197). However, because the court found that Burns was under a duty as Wackenhut's successor to bargain with the Union, the judgment, as amended, does require Burns to make the employees whole for any losses suffered as a result of its unilateral changes in working conditions (A. 189, 197). Cf. *Valleydale Packers, Inc.*, 162 NLRB 1486, 1487, enforced 402 F. 2d 768 (C.A. 5), certiorari denied, 396 U.S. 825.

Both Burns and Wackenhut are nationwide organizations; both performed the identical services at the same facility; although Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors; and finally, and perhaps most significantly, Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42.

II

The goal of federal labor policy is to minimize industrial strife by encouraging employers and unions to establish and maintain written collective bargaining agreements. Had Wackenhut repudiated its collective agreement with the Union in July 1967, it not only would have subjected itself to a suit for breach of contract under Section 301 of the Labor Management Relations Act, but it also would have refused to bargain in violation of Section 8(a)(5) of the National Labor Relations Act. If Burns succeeded to Wackenhut's bargaining obligations under the Act and thus was required to recognize and bargain with the Union, the policy of stability reflected in Section 8(d) of the National Labor Relations Act would be furthered by concluding, as the Board did, that Burns was also obliged to honor the collective agreement which Wackenhut had entered into for the employing enterprise. The Board's position rests on legally sound grounds.

A. A collective bargaining agreement is not an ordinary contract. Rather, it is a set of rules for the industrial community which are established by the employer and the union in accordance with procedures prescribed by the National Labor Relations Act. These rules bind the bargaining unit employees by virtue of the federal labor laws rather than principles of contract law. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332.

B. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, establishes that under federal law the collective bargaining agreement survives the transfer of the employing enterprise to a successor employer. In a suit to compel arbitration under Section 301 of the Labor Management Relations Act, the Court held that, notwithstanding his lack of consent, the successor was bound by the arbitration provisions of the predecessor's collective bargaining agreement. Necessarily implicit in this decision was that the collective bargaining agreement itself was binding on the successor. The duty to arbitrate was created by and flowed from the collective bargaining agreement, and could have bound the successor only because the contract also bound it. Indeed, in two respects the present case is stronger than *Wiley* for concluding that the rights under the collective bargaining agreement survived the change of employers.

C. While the policy favoring arbitration is of importance to national labor policy, the policy of encouraging the maintenance of existing collective bar-

gaining agreements, which is reflected in Section 8(d) of the National Labor Relations Act, is of equal significance. If a mere change in the identity of the employer terminates the existing collective agreement, and thus requires the parties to negotiate a new one, a strike is likely if either party seeks terms more favorable to it than those which previously existed. On the other hand, if the agreement automatically continues in effect, the union and the new employer will have a period of contract continuity during which, in administering the contract, they may be able to establish a foundation for a permanent, harmonious bargaining relationship. Moreover, to require the parties to honor the collective agreement entered into by the predecessor would afford to the employees the basic security conferred by the agreement, and to the successor employer the advantages of predictable labor costs and a period of industrial stability.

The court of appeals erred in concluding that *H. K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99, requires a contrary conclusion. In *Porter*, a contract covering the unit employees had never been agreed to, and the Court held that the Board could not require the employer to agree to a particular provision the union sought. Here, however, a contract has been executed by the predecessor employer and the union without any intervention by the Board. The new employer, by electing to conduct essentially the same business operation, stands in the predecessor's shoes by operation of law.

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Concluding that ordinarily a successor-employer is required to honor his predecessor's contract does not mean that in every circumstance the contract should survive a change of employers. As this Court pointed out in *Wiley*, there must be a "continuity of identity in the business enterprise." (376 U.S. at 551). This is assured if the new employer is a "successor employer" under the holdings of the Board and this Court.

ARGUMENT

When an employer takes over the business operation of another employer who has a collective bargaining agreement with a union, two questions are presented under the National Labor Relations Act: (1) is the new employer required to recognize and bargain with the union; and (2) if this question is answered affirmatively, is the new employer also required to honor the predecessor's collective bargaining agreement.

We argue in Point I that, on the facts here, the Board properly concluded that Burns was a "successor" to Wackenhut and thus required to bargain with the Union. In Point II, we argue that the Board properly concluded that, as a successor, Burns was also required to take over and honor the collective bargaining agreement negotiated for the employing enterprise by Wackenhut.

I. THE BOARD PROPERLY CONCLUDED THAT BURNS WAS A SUCCESSOR TO WACKENHUT WITH RESPECT TO THE LOCKHEED SERVICE OPERATIONS, AND THUS REQUIRED TO HONOR WACKENHUT'S OBLIGATION TO BARGAIN WITH THE UNION

As the Sixth Circuit long ago observed in *National Labor Relations Board* v. *Colten*, 105 F. 2d 179, 183:

> It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the [National Labor Relations] Act in the interest of industrial peace * * *. It needs no demonstration that the strife which is sought to be averted is no less an object of legislative solicitude when contract, death, or operation of law brings about change of ownership in the employing agency. * * *

It is, therefore, settled that the mere transfer of operations from one employer to another does not extinguish the obligation to bargain under the Act; if such transfer leaves substantially intact the identity of the employing enterprise, then the duty of the original employer to recognize and bargain with an incumbent union devolves upon the new employer as a "successor employer." *National Labor Relations Board* v. *Auto Ventshade, Inc.*, 276 F. 2d 303, 304 (C.A. 5). Accord: *Makela Welding Inc.* v. *National Labor Relations Board*, 387 F. 2d 40, 46 (C.A. 6); *National Labor Relations Board* v. *Armato*, 199 F. 2d 800, 803 (C.A. 7); *National Labor Relations Board v. Quaker Tool & Die, Inc.*, 403 F. 2d 1021 (C.A. 6). This obligation precludes the successor employer from making changes in existing employment conditions without

negotiation with the union. See *Overnite Transportation Co.* v. *National Labor Relations Board,* 372 F. 2d 765, 768 (C.A. 4), certiorari denied, 389 U.S. 838. A "successor employer" is also obliged to remedy his predecessor's unfair labor practices. See *United States Pipe and Foundry Co.* v. *National Labor Relations Board,* 398 F. 2d 544 (C.A. 5).

The question whether the employing enterprise remains substantially the same is determined by such criteria as whether (1) the same business operations are being continued; (2) the same plant is used; (3) the same or substantially the same work force is employed; (4) the same jobs exist under the same working conditions; (5) the same supervisors are employed; (6) the same machinery, equipment, and methods of production are used; and (7) the same product or service is manufactured or performed. Not all of these factors are necessary to warrant a finding that the employing enterprise has continued; that determination is based on an evaluation of the total circumstances. See *Maintenance, Inc.,* 148 NLRB 1299, 1300–1303; *Lincoln Private Police, Inc.,* 189 NLRB No. 103, April 12, 1971, 76 LRRM 1727, 1729–1730; Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 N.W.U.L. Rev. 735, 793–806 (1969). See, also, *Thomas Cadillac,* Inc., 170 NLRB 884, affirmed *sub nom. Int'l Assoc. of Machinists* v. *National Labor Relations Board,* 414 F. 2d 1135 (C.A.D.C.), certiorari denied, 396 U.S. 889; *Chemrock Corp.,* 151 NLRB 1074.

The record shows that the basic employing enterprise—the provision of guard service for Lockheed at the airport—retained its essential characteristics despite the change in contractors. It continued to provide the same services it previously had provided for Lockheed at Ontario Airport, but under the management of Burns instead of Wackenhut, pursuant to a contract with Lockheed which was similar to Wackenhut's contract (A. 129–144, 125). Wackenhut terminated its guard service operations at midnight, June 30, and Burns began substantially the same operations on July 1, with a total work force of 42 employees which included 27 of the 42 guards who were formerly employed by Wackenhut, and 15 employees who were transferred from other Burns jobs (A. 76, 102–103, 146).

A majority of the Burns guards at Lockheed were selected from employees of the predecessor employer, to perform the same tasks in substantially the same manner and at the same location as they had in the past (A. 49–50, 53, 59–60, 62). Moreover, although Burns for the most part used its own supervisors, its supervisory setup was similar to that of its predecessor, Wackenhut. Both utilized area supervisors who performed identical functions (A. 73–74, 92), and both had a full-time supervisor on each job with similar functions, including authority with respect to hiring and discharge—Wackenhut called that supervisor a "facility supervisor" and Burns, a "job supervisor" (A. 74–75, 78, 79, 94–95, 125, 133 para. 13, 138 para.

12). Indeed, Burns' job supervisor at Lockheed had worked for Wackenhut prior to July 1 (A. 94).

Finally, Burns did not treat the employees servicing Lockheed either as part of its existing group of unrepresented guards in the Ontario Sub-office area, or as part of an existing represented unit covering guards in parts of the Ontario and Los Angeles Sub-office areas. It treated them as a separate unit. Burns assisted the AFG in obtaining authorization cards from the guards servicing Lockheed, and then recognized the AFG as their bargaining representative in the very unit for which the Union had been certified three months earlier (A. 84–87, 178, Sec. 1, *supra,* p. 4). Burns' reasons for such separate treatment of the Lockheed guards are suggested by the testimony of its branch manager that the size of the job made it "an unusual job. It stands in a class by itself" (A. 104). As a direct result of the bargaining history under Wackenhut, Burns paid the former Wackenhut employees working at Lockheed more than it paid its other employees in the Ontario Sub-office area (A. 95, 108, 62–63, 180).

In sum, as the court below correctly concluded (A. 189), "[a]ll of the important factors which the Board has used and the courts have approved [for finding successorship] are present in the instant case: 'continuation of the same type of product lines, departmental organization, employee identity and job functions,' " quoting from *National Labor Relations Board* v. *Zayre Corp.,* 424 F. 2d 1159, 1163 (C.A. 5).

The case would be different if, instead of continuing the existing enterprise, Burns inaugurated a wholly different one, using solely its own regular personnel and new operating methods and techniques in providing guard service at the airport. In that situation Burns would not be a successor employer to Wackenhut.

Burns suggests (Pet. in No. 71–198, p. 12), however, that it was not Wackenhut's successor because there were no business dealings between it and Wackenhut concerning the transfer of the latter's operations. A finding of successorship for purposes of the National Labor Relations Act, however, does not require privity between the old and the new employers. The question is whether the new employer has taken over the employing enterprise and it is irrelevant whether he does so as a result of negotiations with the predecessor employer or with a third party, here the firm which engaged the employer. *Tom-A-Hawk Transit, Inc.* v. *National Labor Relations Board*, 419 F. 2d 1025, 1027–1028 (C.A. 7); *Maintenance, Inc.*, 148 NLRB 1299, 1301.

Burns also urges (Pet. in No. 71–198, p. 12) that, within six months after it commenced performance at the Lockheed facility, "former Wackenhut guards constituted less than a majority of the work force." But "[i]n a case concerning a successor employer, principles of fair play require that we look to the time of the succession." *National Labor Relations Board* v.

Auto Ventshade, Inc., supra, 276 F. 2d at 307.[8] To apply a different test here, would enable Burns to escape the consequences of its wrongful refusal to recognize the Union upon taking over the service operation.[9]

The cases on which Burns relies (Pet. in No. 71–198, p. 13) are factually distinguishable. In *National Labor Relations Board* v. *Alamo White Truck Service, Inc.,* 273 F. 2d 238, the Fifth Circuit found no successorship where the alleged successor's labor policy was decided on a local basis, whereas the predecessor's had been determined by a head office hundreds of miles away; moreover, there was a change in the type of business being done. See the discussion of *Alamo* in *National Labor Relations Board* v. *Zayre Corp.,* 424 F. 2d 1159, 1163–1164 (C.A. 5), and in *National Labor*

[8] As previously noted, 27 of the 42 guards whom Burns employed at Lockheed when it took over the service operation in July 1967 formerly worked at Lockheed in the employ of Wackenhut (A. 5, 17, 21; 102–103, 146). By December 1967, less than half—and (according to Burns' motions to the Board to reopen the record) by October 1969, less than a third—of the guards employed by Burns at Lockheed were former Wackenhut employees (A. 146–147, 30–35).

[9] Employee turnover does not warrant an employer withdrawing recognition prior to the end of the certification year (March 1968, here). *Brooks* v. *National Labor Relations Board,* 348 U.S. 96; *Armato, supra,* 199 F. 2d at 803. Moreover, an unlawful refusal to bargain within the certification year is not excused by a loss of majority (through turnover or otherwise) occurring subsequent to such refusal. *National Labor Relations Board* v. *Patent Trader, Inc.,* 426 F. 2d 791 (C.A. 2); *Armato, supra; National Labor Relations Board* v. *Quaker Tool & Die, Inc.,* 403 F. 2d 1021 (C.A. 6).

Relations Board v. *Ideal Laundry Corp.*, 422 F. 2d 801, 803–804 (C.A. 10). Here, the Lockheed guard service was transferred from one nationwide organization to another, and the same service continued to be performed. In *Lincoln Private Police, Inc.*, 189 NLRB No. 103, April 12, 1971, 76 LRRM 1727, unlike here, the prior employer's business was divided among several different firms, with the alleged successor acquiring less than a majority of the prior employer's customers.

II. THE BOARD PROPERLY CONCLUDED THAT BURNS, AS A SUCCESSOR TO WACKENHUT, VIOLATED SECTIONS 8(a)(5) AND 8(d) OF THE NATIONAL LABOR RELATIONS ACT BY REFUSING TO HONOR THE OUTSTANDING COLLECTIVE BARGAINING AGREEMENT WHICH WACKENHUT HAD EXECUTED WITH THE UNION

This Court has stated:

> The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife. * * * [*Teamsters Local 24* v. *Oliver*, 358 U.S. 283, 295.]

In recognition of this purpose and the importance of maintaining collective bargaining agreements, Congress provided in Section 301 of the Labor Management Relations Act, 29 U.S.C. 185 (*infra*, p. 39), for judicial enforcement of collective agreements under

federal law. See *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448. Moreover, Congress enacted Section 8(d) of the National Labor Relations Act (*infra*, pp. 37–38), which defines the duty to bargain collectively as including "the execution of a written contract incorporating any agreement reached," and adds that, "where there is in effect a collective-bargaining contract * * * no party to such contract shall terminate or modify such contract, unless" it serves prescribed notices on the other party and maintains the contract in effect for 60 days thereafter or until its expiration date, whichever is later. Section 8(d) also provides that a party to a collective bargaining contract has the right to refrain from discussing or agreeing to modifications in contract terms or conditions, if such modifications are to take effect prior to the period fixed by the contract for reopening these matters.

Accordingly, had Wackenhut repudiated its collective agreement with the Union in July 1967, it not only would have subjected itself to a suit for breach of contract under Section 301 of the Labor Management Relations Act, but it also would have committed the unfair labor practice of refusing to bargain, in violation of Sections 8(a)(5) and 8(d) of the National Labor Relations Act. See *National Labor Relations Board* v. *Strong*, 393 U.S. 357, 359; *National Labor Relations Board* v. *Huttig Sash & Door Co.*, 377 F. 2d 964, 968–969 (C.A. 8). We have shown in Point I that Burns succeeded to Wackenhut's bargaining obligation under the Act and thus was required to recognize

and bargain with the Union.[10] The policy of stability reflected in Section 8(d) would be furthered by concluding, as the Board did, that Burns was also obliged to honor the collective agreement which Wackenhut had entered into for the employing enterprise.

We show below that the Board's position rests on legally sound grounds. Specifically, we show that (1) the question whether a successor employer is bound by his predecessor's collective agreement is to be determined not by principles of contract law, but by those of federal labor law; (2) *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, establishes that under federal labor law a successor employer must honor his predecessor's collective bargaining agreement; and (3) to require a successor employer to do so furthers the puposes of the National Labor Relations Act without impairing other legitimate interests.

A. Federal labor law rather than contract law determines whether a successor employer is bound by his predecessor's unexpired collective bargaining agreement

Under ordinary contract law, a contract is not normally binding on one who has not consented to be bound thereby. A collective bargaining agreement,

[10] Hence, even apart from the effect of the contract, Burns was precluded from unilaterally changing existing terms and conditions of employment without first bargaining with the Union. See pp. 13–14, *supra.*

however, is not simply another contract. See Cox, *Rights Under A Labor Agreement,* 69 Harv. L. Rev. 601(1956). It is a set of rules, established by the employer and the union in accordance with procedures prescribed by the National Labor Relations Act, governing the bargaining unit—the industrial community. These rules are binding upon the employees not by virtue of contract law, but by virtue of the federal labor laws.

Thus, once a union is selected by the majority of employees in a bargaining unit, it has authority to take action that binds *all* employees, including those who do not want it to represent them. In addition, all employees who are hired after the execution of the agreement, and who have had no voice either in selecting the union or in negotiation or ratification of the agreement, are also bound. Moreover, no individual employee has the right to make a private agreement with the employer which is inconsistent with the collective agreement. *J.I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332. As the Court said in *Case* (at 335):

> Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service * * * which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established.

Thus, in order to determine who is bound by a collective agreement, and under what circumstances, it is necessary to look not to the law of contracts, but to the principles and policies of the federal labor law.

B. John Wiley & Sons v. Livingston, 376 U.S. 543, establishes that under federal labor law a successor employer must honor its predecessor's collective bagaining agreement

John Wiley & Sons v. *Livingston,* 376 U.S. 543, involved a dispute between the successor employer (Wiley), into which the predecessor employer (Interscience) had merged, and the union which represented the predecessor's employees, regarding the effect of the merger on certain employment conditions that existed under the collective bargaining agreement between Interscience and the union.[11] The contract contained an arbitration provision, but no provision making it binding on Interscience's successors (376 U.S. at 544). In a suit by the union to compel arbitration under Section 301 of the Labor Management Relations Act, the Court held (376 U.S. at 548) that "the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present

[11] At the time of the merger, Interscience had about 80 employees, of whom 40 were represented by the union. Wiley had a separate plant and about 300 employees, none of whom was represented by a union. Virtually all the Interscience employees eventually transferred to the Wiley plant. 376 U.S. at 545, 551.

here, the successor employer may be required to arbitrate with the union under the agreement." It explained (376 U.S. at 550):

> While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, a collective bargaining agreement is not an ordinary contract. * * * Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance * * * and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship. * * * [Footnote omitted.]

The Court stated (376 U.S. at 549):

> Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by "the relative strength * * * of the contending forces" * * *.[12]

[12] Prior to its decision herein, the Board, applying traditional contract principles, held that a successor employer was not bound by his predecessor's collective bargaining agreement un-

The court below, in distinguishing *Wiley* (A. 191–192), stressed that that decision dealt only with the duty to arbitrate. But since *Wiley* was a suit to compel arbitration, the Court had to decide only whether the arbitration clause of the contract was binding on the successor.[13] Once it decided that the clause was binding, all questions as to the scope, meaning and application of the contract were for the arbitrator. It was necessarily inherent in the *Wiley* decision, however, that the rights created under the contract survived the merger. The duty to arbitrate was created by and flowed from the contract and the dispute involved the interpretation of the contract; the Court rejected Wiley's contention that the merger "[a]utomatically terminate[d] all rights of the employees covered by the agreement" (376 U.S. at 548).

The basic rationale of *Wiley*, we submit, is that the rights created under the contract, including the right to arbitrate disputes thereunder, did survive the merger and that the contractual provision for arbi-

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less he expressly assumed that contract. See *Rohlik, Inc.*, 145 NLRB 1236, 1242, n. 15; *General Extrusion Co.*, 121 NLRB 1165, 1168. The Board changed its position largely because this Court's decision in *Wiley* "altered the perspective in which a successor employer's obligations to honor the provisions of a collective-bargaining agreement negotiated by his predecessor must be viewed" (A. 6).

[13] "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 569.

tration properly was to be utilized to determined how the provisions of the contract should be applied to the successor. The courts of appeals that, following *Wiley,* have dealt with suits to compel successor employers to follow the arbitration provisions of collective bargaining contracts executed by their predecessors, have recognized this broader implication of *Wiley.* In *Wackenhut Corp.* v. *United Plant Guard Workers,* 332 F. 2d 954 (C.A. 9), the court stated (p. 958) that under *Wiley* "the policy of the national labor laws obligates Wackenhut, as the successor employer, to honor the collective bargaining agreement entered into by its predecessor, General Plant." In *United States Steelworkers* v. *Reliance Universal Inc.,* 335 F. 2d 891 (C.A. 3), the court stated (p. 895) that "the 1962 collective bargaining agreement, as an embodiment of the law of the shop, remained the basic charter of labor relations at the Bridgeville Plant after the change of ownership." See also *United States Gypsum Co.* v. *United Steelworkers,* 384 F. 2d 38 (C.A. 5), certiorari denied, 389 U.S. 1042; *Bath Iron Works* v. *Bath Marine Draftsmen's Ass'n,* 393 F. 2d 407 (C.A. 1).

In the present case, neither party invoked the arbitration provisions of the collective bargaining agreement. Rather, the Union filed a charge with the Board alleging that Burns' refusal to bargain with the Union and to honor the agreement constituted unfair labor practices under the National Labor Relations Act. The Board, after concluding that Burns was obligated to bargain with the Union, could have declined to decide whether the refusal to honor the col-

lective agreement was also an unfair labor practice, and required the Union, instead, to seek enforcement of the agreement by invoking its arbitration provisions and instituting a suit under Section 301 to compel arbitration, as in *Wiley*.

The Board, however, has discretion to decide whether to defer to the arbitral process; it is not required to do so. See *National Labor Relations Board* v. *Strong*, 393 U.S. 357; *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432, 436–437. Since the Board had before it for adjudication the other unfair labor practices charged by the Union (which were not subject to arbitration under the collective agreement), the agency properly declined to segmentize this controversy—adjudicating part of it itself, and requiring the parties to submit the other, interrelated portion to arbitration.

In deciding that the duty to bargain imposed by the National Labor Relations Act required a successor employer, like Burns, to honor its predecessor's collective agreement, the Board reached the same conclusion for purposes of that Act that *Wiley* had already implicitly reached for purposes of a contract suit under Section 301 of the Labor Management Relations Act.[13a] Indeed, in at least two respects, the present case is stronger than *Wiley* for concluding that the rights under the collective agreement survived that change of employers.

[13a] The National Labor Relations Act and Section 301 are both part of the Labor Management Relations Act and, as such, are to be construed harmoniously. See *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 702–703.

(1) In *Wiley*, the Court noted that the collective bargaining agreement "did not contain an express provision making it binding on successors of Interscience" (376 U.S. at 544). In the present case the agreement bound "successors and assigns" (A. 150). Prior to bidding for the contract, Burns was informed by Lockheed of the existence of the agreement (A. 105, 126) and presumably it either was aware of that provision or could readily have ascertained its existence.

(2) In *Wiley*, each of the merging companies had its own plant (376 U.S. at 545); after the merger the Interscience employees who remained with Wiley transferred to its plant (p. 551). There was thus more than a formal change in employers; the actual place and conditions of employment also were changed. In the present case, in contrast, the only change was the substitution of Burns for Wackenhut as the employer, with a corresponding substitution of some supervisors; the Burns employees continued to perform the identical work at the identical place they had previously performed as employees of Wackenhut and, indeed, two-thirds of them previously had worked for Wackenhut.

This case is different from *Wiley* in that in the latter the predecessor employer was merged into the successor, whereas here there was a substitution of one employer for another to perform the same work at the same plant. *Wiley* indicates, however, that this difference is immaterial. It pointed out (376 U.S. at 549) that the federal policy of settling labor disputes

by arbitration would be just as much thwarted if the duty to arbitrate were terminated by "a change in the corporate structure or ownership of a business enterprise" "in cases like the present, where the contracting employer disappears into another by merger, as in those in which one owner replaces another but the business entity remains the same."[14]

The remaining question, therefore, is whether the Board properly concluded that the duty to bargain imposed by the National Labor Relations Act requires a successor employer such as Burns to honor the predecessor's collective bargaining agreement. As we now contend, the Board's decision that Burns is bound by the contract properly effectuates the federal labor policy of avoiding industrial strife by carrying out collective bargaining agreements.[15]

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[14] *Ranch-Way, Inc.* v. *National Labor Relations Board*, 445 F. 2d 625 (C.A. 10), pending on petition for certiorari, No. 71–589, involves the obligation of a successor employer who became such by purchasing the business of its predecessor, to honor the latter's collective bargaining agreement.

[15] The holding that a successor employer is bound by the predecessor's collective agreement simply requires the successor to grant the employees whatever rights and benefits they are entitled to under the agreement. It does not settle the entirely separate question as to what the agreement means. The successor would have the same right as the predecessor had under the agreement to adapt the agreement to new and unforeseen conditions, and any dispute over the propriety of the successor's action would be for the arbitrator to resolve. See *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579–581.

C. The Board properly concluded that, except in unusual circumstances, a successor employer such as Burns is required to honor his predecessor's collective bargaining agreement

1. In the present case the Board, after concluding that Burns, as a successor employer, was required to bargain with the union that represented Wackenhut's employees (A. 8–9), stated (A. 9):

> The question before us thus narrows to whether the national labor policy embodied in the Act requires the successor-employer to take over and honor a collective-bargaining agreement negotiated on behalf of the employing enterprise by the predecessor. We hold that, absent unusual circumstances, the Act imposes such an obligation.

This conclusion reflected and was based upon several important policy considerations.

a. The Board noted (A. 9–10) the importance of maintaining collective bargaining agreements in order to promote industrial peace, the dominant objective of the National Labor Relations Act. If a mere change in the identity of the employer terminates the existing collective agreement, the new employer and the union must immediately, at a time of uneasiness over the change of employer, proceed to negotiate a new contract. If a party—employer or union—seeks terms more favorable to it than those which previously existed, a strike is likely. A union, representing employees who are performing the same jobs in the same enterprise, is not likely to submit voluntarily to a reduction in the standards which it had negotiated

with the prior employer. Similarly, a new employer would be unlikely to agree to terms and conditions of employment more burdensome than those which the union had previously accepted for the very time period in question.

On the other hand, if the agreement automatically continues in effect, the union and the new employer will have the period of contract continuity during which, in administering the contract, they can get to know each other and the new employer can get to know the enterprise. This, in turn, may well establish a foundation for informed and effective negotiation of a new agreement when the contract expires, thereby averting a strike.

b. To require the successor to honor the collective agreement entered into by his predecessor more fully protects the employees' right to bargain through representatives of their own choosing. As the Board pointed out (A. 10), in the normal case the successor employer "can make whatever adjustments the acceptance of such obligation [*i.e.*, to honor the predecessor's collective agreement] may dictate in his negotiations concerning the takeover of the business." But "employees cannot make a comparable adjustment"; "[t]heir basic security is the collective-bargaining agreement negotiated on their behalf." This security is tenuous if a change in the identity of the person who continues to operate the same basic enterprise—a change the employees are powerless to prevent—is sufficient to abrogate the bargain which the em-

ployees' union representative negotiated on their behalf with the former employer.[16]

c. A rule binding the parties in a successorship situation to pre-existing contractual obligations is not likely to have a deterrent effect upon the transfer of business enterprises. See the Board's opinion, A. 10–11. On the contrary, there are advantages to a prospective purchaser in knowing that he has a stable labor relationship when he takes over the work. He is able to forecast his labor costs with greater accuracy than if he were facing contract negotiations and a possible strike.[17]

2. Contrary to the opinion below (A. 190–191), to require a successor employer to honor his predecessor's collective agreement is not inconsistent with *H.K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99. In *Porter*, a contract covering the unit em-

[16] The Board added (A. 10–11):

> In the instant case this is certainly so. They work in an industry in which the identity of their employer is subject to annual bidding for the right to perform the services they are engaged in furnishing. The contract involved herein was negotiated for a term of 3 years, but had been in existence for only 2 months at the time of Burns' takeover. Burns had knowledge of the agreement when it bid for the Lockheed service contract. It hired employees on whose behalf the agreement was negotiated. * * *

In the present case, Burns was aware of Wackenhut's agreement with the Union before it placed its bid (*supra*, p. 4), and thus could have figured the increased labor cost which it would have entailed either in its bid or in any subsequent negotiations with Lockheed.

[17] If the agreement is binding on the new employer, it also remains binding on the union. *Kota Division of Dura Corp.*, 182 NLRB No. 51, May 7, 1970, 74 LRRM 1104.

ployees had never been agreed to. The Court held that, in these circumstances, the Board could not order an employer to accept a particular provision sought by the union. Here, however, a contract has been executed between the predecessor employer and the Union without any intervention by the Board, and the new employer, by electing to conduct essentially the same business operation, with many of the same employees, stands in the predecessor's shoes by operation of law.

The Court noted this critical distinction in *Wiley*, stating (376 U.S. at 550): "This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated." It is, in short, the principle expressed in *Wiley*, and not the holding of *Porter*, which controls this case.

3. In holding that ordinarily a successor-employer is required to honor his predecessor's collective bargaining contract, the Board recognized that there may be "unusual circumstances" in which the rule might be otherwise (A. 9). This exception reflects the statement in *Wiley* (376 U.S. at 551) that "[w]e do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives."

Some of the possible exceptions were described in *Wiley*. The Court there pointed out (*ibid*): "[T]here may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably

to be found in the particular bargaining agreement and the acts of the parties involved." Were there such a lack of continuity of the enterprise, however, the new employer would not be a successor as the Board and the courts have defined that term.

Another exception may exist for certain government contracts for the performance of services at government installations or facilities. Many of such contracts must be awarded, sometimes annually, on a competitive basis under the Armed Services Procurement Act of 1947, 62 Stat. 21, as amended (10 U.S.C. 2301 *et seq.*), or the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, as amended (41 U.S.C. 251 *et seq.*). Such contracts are also required by the Service Contract Act of 1965, 79 Stat. 1034, 41 U.S.C. 351 *et seq.*, to be at not less than prevailing labor rates.

When a government contractor whose contract is up for renewal believes or suspects that he will lose it, or that all additional costs will be borne by the government in the new contract, he may have little incentive vigorously to oppose the union's demands for substantial increases in wages and benefits, since such additional costs of doing business will be borne not by himself but by his successor or the government.[18] The result is likely to be that the government will be required to pay substantially higher costs for the goods and services

[18] In the present case, however, Wackenhut had performed services for Lockheed for many years; it had every expectation of obtaining, and indeed bid for, a renewal of its contract; and the wage increases which it agreed to with the union were modest (see *supra*, p. 3).

it obtains in a situation where, as a practical matter, it is unable to protect itself against such increased costs.

The Board has recognized that, in the case of certain government contracts, a successor employer may not be bound by its predecessor's collective bargaining agreement. In *Emerald Maintenance, Inc.*, 188 NLRB No. 139, March 5, 1971, 76 LRRM 1437, pending on petition to review, C.A. 5 (Nos. 71–1402, 71–1591, argued November 29, 1971), decided after the present case, the Board held that the successor employer was not bound by the predecessor's agreement where the contract was subject to annual rebidding, it was awarded following invited bids with no opportunity for negotiation, and the minimum wage rates were fixed by administrative determination under the Service Contract Act without consideration of prospective wage increases. The Board has not yet had occasion to rule on whether government contracts, in other circumstances, also are not subject to the doctrine that the successor employer is bound by the predecessor's collective bargaining agreement.

The present case, of course, does not involve any of these situations. There is therefore no occasion for the Court here to consider or decide those questions.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it denies enforcement of the portion of the Board's order requiring Burns to honor the collective agreement, and the case should be remanded to that court with directions to enforce that requirement.

In all other respects, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1971.

APPENDIX

The relevant provisions of the Labor Management Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 141, *et seq.*) are as follows:

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

Sec. 8(a). It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

* * * * *

Sec. 8(d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting com-

merce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) * * * shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

* * * * *

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-123

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

BURNS INTERNATIONAL SECURITY SERVICES, INC., *et al.*

No. 71-198

BURNS INTERNATIONAL SECURITY SERVICES, INC., *et al.*,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

On Writs of Certiorari To The United States Court of Appeals For The Second Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 120 national and international labor unions with a total membership of 13 and one-half million working men and women, files this brief *amicus*, in support of the position of the NLRB and the Union, with the consent of the parties.

SUMMARY OF ARGUMENT

I

In the instant case the NLRB concluded that a successor employer who repudiates the collective agreement in force at the employing industry violates §§ 8(a)(5) and 8(d) of the NLRA. In *Wiley* v. *Livingston,* 376 U.S. 543, 544, this Court concluded that a successor employer "must arbitrate with the union under a bargaining agreement between the union and" his predecessor. In *Wiley,* the Court was not called upon to decide, and did not in fact reach, the question presented here. Nevertheless, as the Board correctly appreciated, the rationale of *Wiley,* taken against the background of settled law, leads ineluctably to the conclusion that the entire contract, and not just the arbitration clause, continues in effect. This follows if *Wiley* is simply given its due as a principled decision, or if the proper status of the balance of the agreement is analyzed in terms of the policy consideration emphasized in the Court's opinion.

First, since the arbitrator's basic function is to interpret and apply existing collective agreements (*Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597), the substantive terms of the contract must survive where *Wiley* applies or there would be no legitimate function to be fulfilled by the arbitration that has been order.

Second, the conclusion that the entire contract survives flows also from *Wiley's* emphasis (376 U.S. at 549-551) on the desirability of easing the effects of a transition caused by a change in owners by protecting the employees' legitimate expectations engendered by their collective agreement, and its recognition that achievement of this desirable end was permissible because of the non-consensual nature of collective agreements. For arbitration is *a* means, not *the* means, for "protect[ing] the employees from a sud-

den change in the employment relationship" (*Wiley*, 376 U.S. at 549) during the term of a collective agreement. Indeed, since it is one means among many, not an end in itself, it serves that goal only if the arbitration concerns the substantive terms and conditions agreed upon by the parties—in other words, only so long as the entire contract continues in force.

II

Wiley does not apply in every case in which one employer replaces another. The second employer is a "successor" if there is "substantial continuity of identity in the business enterprise before and after [the ownership] change" (376 U.S. at 551). The applicable test is derived from the one the Board had evolved for determining when a new employer is required to recognize an already established union. And in light of the well established criteria which have been developed in applying the "substantial continuity" test, there can be no doubt that Burns is a successor. For as both the Board and the court below recognized (A. 189), this is a paradigm case of successorship—the successor, a large multi-unit company organized along the same lines as the predecessor, continued to perform the same work, at the same place, and with a high proportion of the same employees.

ARGUMENT

I

THE PRINCIPLES ENUNCIATED IN *WILEY* v. *LIVINGSTON*, 376 U.S. 543, REQUIRE SUCCESSOR EMPLOYERS TO HONOR THE COLLECTIVE AGREEMENT IN FORCE AT THE EMPLOYING INDUSTRY.

1. In the instant case Burns refused to recognize Local 162 United Plant Guard Workers, the certified bargaining

representative of the plant protection employees at the Lockheed Aircraft Service Co., Ontario, California, and repudiated, in mid-term, the collective agreement covering those employees. The NLRB found that by so doing Burns had violated § 8(a)(5) of the NLRA and ordered the Company, *inter alia*, to "honor, adopt and enforce the contract." A. 4-5, 26-27.

If Burns had been the signatory employer to the agreement in question the Board's conclusion would have followed as a matter of course from settled NLRA law:

> "[W]here . . . the breach of contract by repudiation is an intrinsic part of the unfair labor practice of refusing to recognize and bargain with the duly constituted representative, the Board's jurisdiction, under section 10(c), includes the power to remedy that phase of the unfair labor practice. See Consolidated Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 236 . . . Since the repudiation of the contract was based on the refusal to recognize and bargain with the Union, part of the appropriate remedy was to eradicate the repudiation by requiring the employer to 'honor' the contract. See H. J. Heinz Co. v. N.L.R.B., 311 U.S. 514, 526.
>
> "Read in this light, the word 'honor' has the limited role of placing the parties, with reference to the contract, back in the position which they occupied prior to the breach. It does not mean that specific performance was decreed as Hyde contends. Nor is it an adjudication as to the validity of any or all of the contract provisions." *NLRB* v. *Hyde*, 339 F.2d 568, 572-573 (C.A. 9); see also *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421; *NLRB* v. *Huttig Sash & Door Co.*, 377 F.2d 964 (C.A. 8).

Here, however, the signatories were the Union and the Wackenhut Corp. and Burns was Wackenhut's successor.[1]

[1] We develop the argument supporting the conclusion that the Board's "successorship" finding was correct in part II *infra*, pp.——.

In light of the principle enunciated in *Wiley* v. *Livingston*, 376 U.S. 543, the Board concluded that this was a distinction without a legal difference. It stated that:

> "Section 8(d) . . . clearly demonstrates Congress' recognition of the paramount role in maintaining industrial peace played by parties' adherence to existing collective-bargaining agreements.
>
> "The impressive policy considerations favoring the maintenance and adherence to existing collective-bargaining agreements are not wholly overborne by the fact that Burns has not signed the contract here in issue. Nor can a holding that Burns is obligated to honor and adhere to the express terms of the contract readily be equated with compelling Burns to agree to a bargaining proposal or make a concession it is unwilling to make. Indisputably, there is a contract. That contract covers the employees of the employing industry which Burns took over; it was negotiated on behalf of the employing enterprise by Wackenhut, Burns predecessor; [it] is reasonably related to Burns . . . Burns is [therefore] bound to that contract as if it were a signatory thereto . . . [I]ts failure to maintain the contract in effect is violative of Sections 8(d) and 8(a)(5) of the Act." A. 9-10.

In reaching this conclusion the Board reasoned: that, from the first, § 8(a)(5) has been interpreted as requiring a successor to recognize the union established at the employing industry (e.g., *Stonewall Cotton Mills*, 80 NLRB 325, 327); that, as a general rule, the bargaining obligation includes the duty to honor a valid contract in force (e.g. *NLRB* v. *Hyde*, 339 F.2d at 572-573); that, nevertheless, prior to this Court's decision in *Wiley*, the Board had not required the successor to honor the contract because it had followed the common law "privity of contract" rule (e.g. *Jolly Giant Lumber Co.*, 114 NLRB 413); that *Wiley* had rejected that common law rule; and that this rejection, the

overall structure of the Act, and the policy considerations cited in *Wiley* all demonstrate that a repudiation of a collective agreement by a successor, no less than a repudiation by the employer who originally signed the contract, is a violation of § 8(a)(5). A. 6-11.

To be sure, as the court below emphasized (A. 191-192), *Wiley* presented a narrower question than the one posed here—namely, whether a successor "must arbitrate with a union under a bargaining agreement between the union and" his predecessor (376 U.S. at 544). As noted in the AFL-CIO *amicus* brief in *Wiley*, the only brief which argued that the federal law of labor relations requires the conclusion that successor employers must arbitrate, the litigation posture of that case presented:

> "a situation which [was] in many resepects familiar to this Court. A union claims that employees are entitled to certain rights and benefits under a collective bargaining agreement. The employer disagrees. The agreement provides a grievance and arbitration procedure 'as the sole means of obtaining adjustment' of any dispute 'arising out of or relating to this agreement, or its interpretation or application, or enforcement.'' The employer, however, refuses to submit the dispute to arbitration. By an action under Section 301 of the Labor Management Relations Act the union seeks to compel the employer to arbitrate.
>
> "The sole question presented is whether the employer is obliged to arbitrate the underlying dispute with the union. The merits of that underlying dispute are not before the Court. The union has not asked this Court—or any court—to determine whether the employees are entitled to the seniority, pension, severance-pay, vacation, and other benefits which the union claims. It asks only that the question be determined in accordance with the arbitration provision of the

agreement." AFL-CIO Amicus Brief in No. 91 Oct. Term 1963, pp. 1-2.

And, of course, once it had been determined that arbitration was required the Court's function was at an end:

> "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under the regime is entrusted to the arbitration tribunal." *Steelworkers* v. *American Mfg. Co.* 363 U.S. 564, 569.

Thus, the Court was not invited to reach, and *Wiley* does not settle in terms, the question of the extent to which the substantive provisions of a collective agreement survive a change in ownership which does not destroy the employing industry. But, as the Board correctly appreciated, the rationale of *Wiley*, taken against the background of settled law, leads ineluctably to the conclusion that the entire contract, and not just the arbitration clause, continues in effect. This follows if *Wiley* is simply given its due as a principled decision, or if the proper status of the balance of the agreement is analyzed in terms of the policy considerations emphasized in the Court's opinion.

2(a) Since the focus here is on *Wiley's* implications, rather than on its square holding, the proper starting point is the logic Justice Harlan employed in reaching the conclusion that successors are required to arbitrate. Briefly stated the opinion proceeds as follows:

First, the question presented was to be dealt with in terms of the federal law of labor contracts: "Both parties urge[d] that this question [was] for the courts" and the Court concluded (citing *Atkinson* v. *Sinclair Refining Co.* 370 U.S. 238, 240) that:

> "Past cases leave no doubt that this is correct . . .

> the duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *Wiley,* 376 U.S. at 546-547.

Second, the governing federal law fashioned "from the policy of our national labor laws," (*Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 456) was grounded on the proposition that industrial peace will be furthered if the contractual protections embodied in a collective agreement are preserved when the employing industry survives a change in ownership:

> "The negotiations leading to a change in corporate ownership . . . will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by 'the relative strength . . . of the contending forces.'" *Wiley,* 376 U.S. at 549.

Third, because of the unique function and character of collective bargaining agreements, it was proper to dispense with common law notions of "privity of contract" and to hold that the successor is bound by the settlement negotiated by his predecessor:

> "A collective bargaining agreement is not an ordinary contract . . . Central to the peculiar status and function of a collective bargaining agreement is the

> fact . . . that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy." *Wiley*, 376 U.S. at 550-551.

(b) The *Wiley* opinion makes it manifest that the Court's decision was grounded in, rather than being a departure from, prior § 301 law. This in itself demonstrates that it was not the Court's intention to leave arbitrators, and the Board (cf., *NLRB* v. *Acme Industrial Co.*, 386 U.S. 432, 436-437), at large in determining the parties' substantive obligations in successorship situations. As the language of § 203(d) shows, the national labor policy favors voluntary private adjustments as "the desirable method for settlement of grievance disputes arising over the application or interpretation of *an existing collective-bargaining agreement*" and not as a general cure-all. Thus, while this Court has given an hospitable scope to arbitration, it has also recognized that:

> "An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but

to refuse enforcement of the award." *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597.

Since the arbitrator's basic function is to interpret and apply agreements, the substantive terms of the contract must survive where *Wiley* applies or there would be no legitimate function to be fulfilled by the arbitration that has been ordered. As Arbitrator Rolf Valtin asked in his recent comprehensive discussion of the effect of *Wiley:*

> "Wherefrom if not the Agreement, [does] the obligation to arbitrate arise and in relation to what, if not the Agreement, [is] there . . . to be arbitration?" *U.S. Gypsum Co.*, 56 LA 363, 388.

Indeed, the *Wiley* opinion emphasizes the bonds that tie the arbitrator to the agreement. It begins from the premise that "the duty to arbitrate [is] of contractual origin," recognizes the contractual base of the successor's obligation throughout, and concludes that *Wiley* "cannot readily be assimilated to the category in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated" (see 376 U.S. 547-555). Thus, the fair implication of *Wiley* is that the parties' substantive obligations must also stem from the agreement. And this is simply another way of stating that the entire contract and not simply the arbitration clause continues in force.

(c) The conclusion that the entire contract survives flows also from *Wiley's* emphasis on the desirability of easing the effects of a transition caused by a change in owners by protecting the employees' legitimate expectations engendered by their collective agreement, and its recognition that achievement of this desirable end is permissible because of the non-consensual nature of collective agreements.

A union, representing employees who are performing the same jobs in the same enterprise, is unlikely to submit

peacefully to terms and conditions of employment more burdensome than those which it previously accepted—and, indeed, by which the employer would still be bound but for the fortuity of the sale. And an employer, who has employees who are performing the same jobs in the same enterprise, is equally unlikely to submit peacefully to terms and conditions of employment more advantageous than those the union had previously secured—and, indeed, by which the union would still be bound but for the fortuity of the sale. In other words, either party would consider it extraordinarily unfair for the other to attempt to gain an advantage simply because of a change in ownership of the business.

This reaction occurs, of course, because the collective agreement is not simply a bilateral arrangement binding only on its signatories; it is "an effort to erect a system of industrial self-government" (*Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580) governing the day-to-day affairs of the bargaining unit—the industrial community. The rules so established are binding upon the employees not by virtue of principles of contract law, but by virtue of the federal labor laws. Although it is common to describe the union as the "agent" of the employees, it is obviously not an agent in the usual sense. Once a union is selected by the majority of employees in a bargaining unit, § 9(a) of the Act grants it the authority to bind all the employees, including those who do not wish to be represented in the establishment of the rules. In addition, all the employees who are hired after the execution of the agreement, and who have had no voice either in selecting the union or in the negotiation or ratification of the agreement, are also bound. *J. I. Case Co.* v. *NLRB*, 321 U.S. 334. Moreover, no individual employee has the right to make a private agree-

ment with the employer, and any such agreement is void. *Ibid.* As this Court said in *J. I. Case*, 321 U.S. at 335:

> "Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service . . . which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established."

It follows, as *Wiley* recognizes, that it is no more radical to hold that a purchaser of a business is bound by the collective agreement than it is to hold that subsequently hired employees are bound by it. Both are strangers to the agreement when made. But both should be held to accept the agreement as the rule of the community as a condition of their entrance into it.

This willingness to bind those who have not consented, as *Wiley* indicates (376 U.S. at 550), stems from the fact that a collective agreement is not a consensual arrangement. When an employer hires his employees, he is prohibited by § 8(a)(3) of the Act from selecting them on the basis of their membership or nonmembership in a labor organization. Thus, he cannot avoid entering into the agreement by careful selection of his work force. And when a union demonstrates that it represents a majority of those employees, the employer has no choice as to whether or not to negotiate with that union; he is required by §§ 8(a)(5) and 8(d) not only to meet with and talk to the union, but to make a sincere effort to reach an agreement. It is plain therefore that there is nothing consensual about the relationship between the parties. Moreover the agreement which emerges from this type of non-voluntary relationship cannot be termed "consensual" in the usual sense. In no

other context, so far as we are aware, does the law require private citizens to meet and make a sincere effort to reach a *modus vivendi*, and reduce their agreement to writing.

Thus *Wiley*, like *J. I. Case*, is a product of the recognition that because of the implications inherent in the nonconsensual nature of the bargaining relationship, it is permissible to apply collective agreements to those who have not consented to be bound. To do so does not trench on the parties' right to strike their own bargain. In both instances a bargain has been freely struck and the effect of both the *Wiley* and *J. I. Case* rules is to insure that the parties' just anticipation of contractual stability is not frustrated.

The conclusion that those who have not consented should in certain instances be bound is not one-sided. Orderly and peaceful labor relations are a benefit to the employer as well as the employees and the public. That is the lesson of *Kota Divison of Dura Corp.*, 182 NLRB No. 51, where the Board found that the union violated the Act by seeking new employment conditions over the objections of the successor employer who wished to continue the preexisting agreement. Indeed, while the present litigation demonstrates that not all employers acknowledge this simple truth there is substantial management recognition that the Board's decision here is even handed. As Lawrence F. Doppelt, a partner in a firm representing employers, has stated:

> "Economics, logic, and the realities of industrial relations generally require that the successor recognize its predecessor's union, if only to avoid labor turmoil. No self-respecting union will permit itself to be ousted from an established collective bargaining relationship without some kind of struggle, merely because of a change in employer ownership, be it economic or legal. And the last thing most successors want at the time

of a business takeover is labor trouble, whether in the form of a work stoppage, a picket line, or protracted litigation. Further, where a predecessor's employees are accustomed to union benefits and representation, the successor may validly believe that attempting to operate without a union will result only in employee unrest and future union organizational efforts, adversely affecting production and efficiency.

A successor recognizing its predecessor's union for the above or other practical reasons generally assumes the obligations of its predecessor's union contract based on similar considerations. By so assuming the contract, the successor also protects itself in two important respects for the contract term: its major costs and obligations will not exceed those set forth in the contract; and, since most contracts contain a no strike clause prohibiting union strikes and employee work stoppages, there are basic assurances against severe industrial strife. If, on the other hand, the successor recognizes the predecessor's union without its union contract, it gives the union the opportunity to engage in collective bargaining for a new contract, and a sophisticated successor recognizes that, when a union bargains, it wants more. Under normal circumstances, it would be naive to expect a predecessor's union to settle for less than it had in its predecessor's contract, or even for the same thing. Moreover, without a contract in effect, the union is free to strike and otherwise exert economic force against the successor." Doppelt, *Successor Companies: The NLRB Limits the Options—And Raises Some Problems,* 20 DePaul L.Rev. 176-177 (footnotes omitted).

The force of the points just developed can be escaped only if the arbitration clause is regarded as unique. For the basic canons of legal reasoning indicate that in determining the status of the remainder of a labor contract in a successorship situation, the approach followed in deter-

mining the sole issue presented in *Wiley* should be followed unless the preference for arbitration is *sui generis*.

Arbitration is in fact only one facet of the overall emphasis on furthering stable labor relations during the term of a collective agreement. During the negotiation of labor contracts "the policy in all national labor legislation is to let loose the full economic power of each [party]." *Trainmen* v. *Terminal Co.*, 394 U.S. 369, 384; see also *American Ship Bldg. Co.* v. *NLRB* 380 U.S. 300; *NLRB* v. *Insurance Agents International*, 361 U.S. 477. This policy is not, of course, a glorification of strife for its own sake. "Collective bargaining with the right to strike at its core" (*Motorcoach Employees* v. *Missouri*, 374 U.S. 74, 82) is encouraged as a means of promoting industrial peace:

> "As has frequently been stated, collective bargaining is not an end in itself. It is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time with results advantageous both to the worker and the employer." H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 20 (1935).

After the consummation of an agreement the push of the law is to promote stability by restricting the occasions for strife. Section 203(d) promotes this end by encouraging grievance and arbitration procedures. Section 301 serves the same function by making collective agreements enforceable in court. And § 8(d) of the Act, as the Board stated in *C & S Industries*, 158 NLRB 454, 457, and reemphasized in the instant case (A. 9-10), embodies the "statutory intent to stabilize during a contract term agreed-upon conditions of employment."

In short, arbitration is *a* means, not *the* means, for "protect[ing] the employees from a sudden change in the employment relationship" (*Wiley*, 376 U.S. at 549) during

the term of a collective agreement. Indeed since it is one means among many, not an end in itself, it serves that goal only if the arbitration concerns the substantive terms and conditions agreed upon by the parties—in other words, only so long as the entire contract continues in force.

3. Two caveats are in order. First, it is of the essence to note the limited effects of a holding that a successor is bound by the entire collective agreement. As the language from *NLRB* v. *Hyde* quoted on p. 4 *supra* shows, whether the original employer or a successor is involved, the holding that § 8(a)(5) has been violated by a repudiation of the contract simply entails the conclusion that the successor is obliged to grant the employees whatever rights and benefits they are entitled to under the contract. It does not settle the entirely separate question as to what the agreement means. And it is the answers to that question which determine the exact nature of the employer's obligations.

Thus *Wiley* means that the successor will not be heard if he argues that he is inhibited from running the business as he wishes by restrictions in the collective agreement. He has no more standing to make a claim for "relief" predicated on the fact that he was not a party to the negotiations than a new plant manager sent in by dissatisfied stockholders who feel that the labor situation in the plant has gotten out of hand. Because of the costs inherent in the unstable labor conditions which would result from any other policy, both must wait until the expiration of the contract, a period which rarely exceeds three years, to renegotiate the contract unless the employees and the union can be convinced that the common interests of all concerned will be served by a voluntary reopening.

The collective agreement may, however, allow the new

owner to make extensive entrepreneurial changes, and he may see problems and possibilities inherent in the situation facing the company that were unforeseen, and perhaps unforeseeable, from the vantage point of those who negotiated the contract. At this point the successor might argue that, even though it cannot be said that the employing industry has been destroyed, the changed circumstances have relieved him of the obligations imposed by certain provisions of the contract because those provisions no longer fit the situation. Nothing in *Wiley* or the Board holding here pretermites that contention. For it raises questions concerning the agreement's meaning. And *Wiley* specifically directed that those questions are to be referred to the arbitrator to determine "the effect of the merger on the rights of the covered employees" (376 U.S. at 554-555).

Recognizing the fact that changed conditions may be taken into account in interpreting an agreement under *Wiley* is, of course, not to make new law, nor to allow the interpreter the power to pick and choose the contract terms he will enforce. Even when there is only one employer in the picture it is by no means unusual for the contract to allow him to carry out entrepreneurial decisions designed to meet changed circumstances which result in extensive changes in the working environment of the plant. Moreover, because of the breadth of regulation undertaken in a collective agreement and the difficulties inherent in the attempt to set up a system of industrial self-government, there will, of course, be unforeseeable contingencies that will arise. As this Court has recognized, the foregoing does not mean that the resulting problems are deemed to be unregulated and that the agreement is no longer binding; their resolution, within the confines of the contract, are grist for the arbitrator's mill:

> "The grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *Warrior & Gulf*, 363 U.S. at 581-582.

Where a successor is involved, it is reasonable to suppose that there will be no shortage of these difficult questions of interpretation. But these questions will not be different in kind from those that arise in the one-employer situation. *Wiley* itself amply illustrates this point. The difficult problems in that case stemmed not from the merger of Wiley and Interscience but from Wiley's post merger decision to consolidate two previously separate operations in one plant. And the complex task of working out those problems would have been exactly the same if there had been no merger and if Wiley had been a two-plant company which decided to merge its two previously separate operations. See *Interscience Encyclopedia*, 55 LA 210, the arbitration in *Wiley* on remand. The process of contract interpretation and administration mandated by §§ 203(d) and 301 insures sufficient flexibility in cases involving one employer, and the underlying postulate of *Wiley* is that this process is sufficiently adaptable to serve the same salutary function where there is a successor.

Second, it should be noted that just as the effect of *Wiley* on the meaning of the labor contract may easily be overstated, so too may its effect on the parties' ability to order their own affairs on successorship. In order to encourage

peaceful and stable labor relations, the *Steelworkers' Trilogy* recognizes a presumption that all questions concerning the contract are to be referred to arbitration. The parties, if they so desire, may overcome this presumption by the use of plain and unambiguous language indicating their desires. Thus, one of the basic functions of the *Trilogy* is to encourage the parties to consider and settle the role that arbitration should play in their contractual relationship. By the same token, *Wiley* recognizes a presumption that successors will be bound by the collective agreement in force at the time of the change in ownership. In this instance, as in the case of arbitration, the parties may overcome this presumption by the use of plain and unambiguous language indicating their desires. Thus *Wiley*, like the *Trilogy*, encourages rather than precludes responsible private decision making.

4. The court below developed two arguments in refusing to enforce the Board's order requiring Burns to honor the contract. First that:

> "The action of the Board in this case is contrary to the letter as well as the spirit of the Supreme Court's recent decision in *H. K. Porter, Inc.* v. *National Labor Relations Board*, 397 U.S. 99 (1970). That case held that the Board and the courts '[are] without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement.'" A. 190.

Second that *Wiley* held only that "the impressive policy considerations favoring arbitration are not wholly overborne by the fact that *Wiley* did not sign the contract being construed." A. 191-192.

The contention that *Wiley* does not support the Board's decision is, as we have attempted to demonstrate, without support in reason. It accords this Courts opinion "the nar-

rowest possible reading focusing only on the specific literal language of the [holding] rather than the broad'' implications of its rationale (cf, *Transportation Union v. Michigan Bar,* 401 U.S. 576, 580).

The argument that *H. K. Porter* v. *NLRB,* 397 U.S. 99, is decisive here is no less defective. As the Second Circuit's language indicates, both ''the Board and the courts'' are without power to write contracts for the parties. But *Wiley* settles the proposition that this limitation does not preclude a court from imposing the duty to arbitrate upon a successor. For such a case:

> ''. . . cannot readily be assimilated to the category of those in which there is no contract whatever . . . There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate [in that] contract construed in the context of a national labor policy.'' (376 U.S. at 550).

Thus the Court expressly disclaimed any authority to write contracts. It made it perfectly plain that it was simply requiring adherence to a contractual commitment entered into by the union and the predecessor, a party ''reasonably related'' to the successor. And of course *Wiley* carries an implied commitment by the courts to enforce arbitral awards against successors—awards, which as already pointed out (pp. 9-10 *supra*) are legitimate only if they draw their essence from the union-predecessor collective agreement.

This being so, the view that the Board can not order a successor to honor a contract is completely unwarranted. It could be entertained only if *H. K. Porter* were read to overrule *Wiley sub silentio.* For *Wiley* and the Board's decision here are based on exactly the same theory of contractual obligation—that:

> ". . . a holding that [the successor] is obligated to honor and adhere to the express terms of the contract [cannot] readily be equated with compelling [him] to agree to a bargaining proposal or make a concession it is unwilling to make. Indisputably, there is a contract. That contract covers the employees of the employing industry which [the successor] took over; it was negotiated on behalf of the employing enterprise by [his] predecessor." A. 10; compare *Wiley,* 376 U.S. at 551.

If the courts have the power, under § 301, to compel a successor to arbitrate without running afoul of the prohibition against writing contracts, as we know they do, the Board assuredly has the statutory power to compel a successor to honor the contract without transgressing that limitation. And there is not the slightest inference in *H. K. Porter* that the Court intended to question *Wiley.* Indeed, since *Wiley* is firmly based on a contract the parties had written without governmental interference, its rationale and *H. K. Porter's* are entirely consistent. The two cases would be inconsistent only in the event that it were held that *Wiley* empowers arbitrators to write new contracts for the parties rather than limiting them to applying the agreement in force.

5. In summary, Mr. Doppelt is, we submit, clearly correct in concluding that:

> "[U]pon . . . mature consideration, it is difficult to fault the Board for its *Burns* decision. For one thing, the Board was not truly setting labor policy in this instance; rather; it was merely following labor policy previously set forth in court cases in which it was not involved.
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> "The principle for which [*Wiley*] stands not only paved the road for the Board's *Burns* decision, but escorted the Board most of the way down it.

"Further, it appears fair to state that with *Burns* the Board has 'caught up with the exigencies of the collective bargaining community [and] recognized the realities of the employer-employee relationship.' After all, *Burns* merely codifies what most employers and unions do in any event, and it thereby fulfills the reasonable expectations of the union and employer involved. It also fulfills the expectations of the predecessor's employees. . . .

"Permitting a successor to flout such reasonable expectations by rejecting a precedessor's union contract may result in industrial instability. Employees are carefully taught by both unions and employers that the union contract is, indeed, the shop law. It governs the actions of all parties: Employees as well as employers are expected to abide thereby. Moreover, employees know they have secured their contractual rights through the give and take of collective bargaining, often ceding desired ends in order to obtain others. If employees observe contractual law being ignored by the successor, with their contractual gains dissipated, they are trained that industrial laws may be disregarded by parties at opportune moments. This, of course, invites industrial lawlessness, disrespect for industrial rules, and overall cynicism of the entire collective bargaining process.

"The *Burns* rule, on the other hand, can further the basic labor policy by avoiding "industrial strife." With *Burns*, all parties know where they stand from the outset of their relationship. They are aware of their mutual rights and obligations. This ordinarily reduces confrontations and disputes, necessarily adding to labor stability. Further, a successor's refusal to honor a predecessor's union contract can lead to strikes and other labor unrest, hardly enhancing the Act's aim of minimizing industrial strife.

"Finally, *Burns* protects those most needing protection. The successor, of course, can protect itself

against much of the unfairness otherwise inherent in *Burns*. It can ascertain the terms of a predecessor's union contract before making an acquisition, and consider any burdensome terms in deciding whether to close the deal or to seek financial concessions from the predecessor. The employees, on the other hand, may have no protection without a contract. While there is, indeed, a breed of enlightened employers, there is also the employer who is enlightened only if legally or economically forced to be. Left to his own devices, such employer could deprive employees of valuable contractual gains, including wages, benefits and job security accumulated only after long, hard struggles." *Dappelt*, 20 DePaul L. Rev. at 183-184.[2]

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[2] The Board reserved the authority to make exception to the rule established in the instant case to accommodate "unusual circumstance," A. 9. In *Emerald Maintenance, Inc.*, 188 NLRB No. 139, it exercised that authority to except successor employers operating under the Service Contract Act of 1965, 41 U.S.C. § 351, *et seq.* The Board's conclusion in *Emerald Maintenance* that "this case suggests the hazards of enforcing the contracts of one employer against a successor where annual re-bidding normally produces annual changes in contractor identity" flies directly in the face of its decision here in which it supported its decision on the ground that the employees worked "in an industry in which the identity of their employer is subject to annual bidding for the right to perform the services they are engaged in furnishing" (A. 11). Moreover, there are substantial grounds for believing that *Emerald Maintenance* rests on a misreading of the Service Contracts Act. See Special Subcommittee on Education and Labor, House of Representatives, 92 Cong., 1st Sess., "The Plight of Service Workers Under Government Contracts" (Comm. Print 1971). Finally, there is a question as to whether the *Emerald Maintenance* exception applies to employers operating under negotiated procurement agreements with the United States. That question is being litigated before the Board at the present time. *Atlantic Technical Services Division of Southeast Enterprises, Inc.*, NLRB Case No. 12-CA-5158.

Emerald Maintenance turns on the Board's interpretation of the Service Contracts Act and its determination that the policies of that Act take priority over the *Burns* principle. Since the Service

II

THE BOARD'S SUCCESSORSHIP DETERMINATION WAS CORRECT.

1. *Wiley* does not apply in every case in which one employer replaces another. The second employer is a "successor" if there is "substantial continuity of identity in the business enterprise before and after [the ownership] change" (376 U.S. at 551). This serves to insure that the contractual obligations imposed are not "something imposed without, not reasonably to be found in the particular bargaining agreement and the acts of the parties," *(ibid)*. While this standard is new to the law of contracts it did not emerge full blown in *Wiley*. The applicable test is derived from the one the Board had evolved for determining when a new employer is required to recognize an already established union. See A. 7-9; compare the AFL-CIO *Amicus* Brief in *Wiley* at pp. 13-14. And in light of the well established criteria which have been developed in applying the "substantial continuity" test, there can be no doubt that Burns is a successor. As the court below stated:

> "The determination that an employer is a successor is made on the basis of 'continuity in the business operation,' *NLRB* v. *Zayre Corp.*, 424 F. 2d 1159, 1162 (5th Cir. 1970), that is, 'whether the operation is essentially the same as that previously conducted . . .' *S. S. Kresge Co.* v. *NLRB*, 416 F.2d 1225, 1234 (6th Cir. 1969). . . .
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> * * * *
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> "All of the important factors which the Board has

Contracts Act is not involved in the instant case, it is obviously most appropriate for the validity of the Board's reasoning in *Emerald Maintenance* to be determined through a process of "litigation elucidation" (*San Diego Building Trades Council* v. *Garman*, 359 U.S. 236, 241) after the validity of *Burns* has been decided. For this reason we do not treat with the merits of *Emerald Maintenance* herein.

used and the courts have approved are present in the instant case: 'continuation of the same type of product lines, departmental organization, employee identity and job functions,' *NLRB* v. *Zayre Corp., supra,* at 1163 (footnote omitted). Both Burns and Wackenhut are nationwide organizations; both performed the identical services at the same facility; although Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors; and finally, and perhaps most significantly, Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42.[1]

[1] Although the absence of wholesale hiring of predecessor's employees does not require a finding that there has been no successorship, see *Monroe Sander Corporation* v. *Livingston,* 377 F.2d 6, 12 (2d Cir.), cert. denied, 389 U.S. 831 (1967), its presence is relevant to show similarity of operations. *Id.*" A. 189.

And, of course, Burns' reliance on "the total absence of dealings between" it and Wackenhut (Pet. p. 1) is completely undermined by *Tom-A-Hawk Transit, Inc.* v. *NLRB,* 419 F.2d 1025, 1026-1027 (C.A. 7); a case in which one bus line franchisee replaced another to perform the "identical . . . basic operations and services," where the Seventh Circuit noted:

> "'Tom-A-Hawk maintains that successorship requires some form of privity between the employers and that none existed here since there was no transfer of assets or other direct dealing between Aurora City Lines and Tom-A-Hawk. . . . However, no direct contractual relationship is required, for example, 'when contract, death, or operation of law brings about change of ownership in the employing agency.' Similarly there need be no transfer of assets. As the Board said of Maintenance, Inc., 148 N.L.R.B. 1299, 1301 (1964):

> The duty of an employer who has taken over an 'employing industry' to honor the employees' choice of bargaining agent is not one that derives from a private contract, nor is it one that necessarily turns upon the acquisition of assets or assumption of other obligations usually incident to a sale, lease, or other arrangement between employers. It is a public obligation arising by operation of the Act.
>
> "Therefore, we do not think that the absence of dealing between Aurora City Lines and Tom-A-Hawk bars a finding of successorship in this case. The evidence clearly establishes the requisite finding of continuity in the employing industry."

In short, as both the Board and the Second Circuit recognized, this is a paradigm case of successorship—the second employer, a large multi-unit company organized along the same lines as the predecessor, continued to perform the same work, at the same place, and with a high proportion of the same employees.

2. While the *Wiley* test of successorship is derived from prior Board law it is not, and indeed could not, be identical. As we noted to the Court in *Wiley:*

> "We do not mean to suggest that the question of whether the union's representative status survives a change in ownership is exactly the same question as whether an existing collective bargaining agreement survives. One test which the Board applies in answering the first question, for example, is whether there has been any substantial change in the identity of the employees. Obviously, that question cannot itself be relevant in determining whether the agreement survives, since if the new owner is bound by the agreement he would not be permitted to replace the old employees with new ones except in accordance with the

agreement." AFL-CIO *Amicus* Brief in No. 91, Oct. Term 1963, n. 6, pp. 14-15.

Recognizing the force of this logic *Monroe Sander Corp.* v. *Livingston*, 377 F.2d 6, 12 (C.A. 2), *cert. denied*, 389 U.S. 831, holds that a finding of successorship is proper even though the successor retained "none of the former . . . employees." The Second Circuit there explained *(ibid)*:

> "Appellants point to the fact that none of the former Sander employees were hired in New Jersey. The relevance of the successor's engaging its predecessor's employees, however, is to show similarity of operations. Wiley, 376 U.S. at 481, . . : [Here] there was other adequate evidence of identity of operations. Moreover, the failure to hire Sander employees in New Jersey could not be determinative where, as here, that failure is the nub of the dispute."

For the necessary predicate of the proposition that the second employer's refusal to retain the work force previously employed negates a finding of successorship is that the employer is legally free to refuse to hire them. That, of course, was the pre-*Wiley* situation. Prior to *Wiley* a successor took free and clear of the labor agreement. He was, therefore, at liberty to hire and fire for good reason, bad reason or no reason at all. After *Wiley*, however, a discharge by a successor without good cause is a proper subject for arbitration where as here the collective agreement limits discharge and discipline to situations in which there is "just and sufficient cause" (A. 154-155). That is the lesson of *Monroe Sander*. As Mr. Doppelt states:

> "In the past, a successor frequently rejected those predecessor employees it considered did not meet its standards, basing its rejections on interviews or other considerations. Although such standards were often vague, the successor was under no greater burden to justify any such rejections than in the case of new

> hires. However, almost any union contract now assumed by a successor, as a result of *Burns*, will require that employees be discharged only for 'fair' or 'just cause,' meaning, under the contract's grievance and arbitration procedures the employer has the burden of proving an employee has engaged in serious or repeated misconduct in order to justify a discharge. Such a clause would, quite possibly, protect a predecessor's employees: They are technically the successor's employees at the time of the business transfer and the successor's failure to hire them is in effect a discharge. Thus, the successor's right to reject those predecessor employees it deems unacceptable without showing a justifiable reason therefor would be severely limited." Doppelt, 20 DePaul L. Rev. at 186-187.

Where the agreement continues in force, in other words, discharges without proper cause are a contract violation. To say that such violations free an employer, who would otherwise be a successor, from his overall obligation to honor the agreement is evident nonsense in the strict meaning of that word. The same factor cannot be both the determinant of whether *Wiley* applies and the subject to be decided in the arbitration *Wiley* decrees.

Equally to the point, a rule which rewarded an employer by relieving him of successor status by reason of his refusal to continue the predecessor's employees would be directly contrary to *Wiley*'s basic policy—that:

> ". . . the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers [should] be balanced by some protection to the employees from a sudden change in the employment relationship." (376 U.S. at 550).

For such a rule would encourage employers who would otherwise be successors to discharge the very employees whom the Court sought to protect. *Wiley* would then result

in the predecessor's employees losing not only their contract rights but their jobs by reason of the advent of a second employer. And that would in truth be "to turn the blade inward." *Graham* v. *Locomotive Engineers,* 338 U.S. 232, 237.

The conclusion that the composition of the work force is not decisive in determining the second employer's § 8(a)(5) obligations is entirely consistent with the overall thrust of the relevant law. Employee turnover cannot defeat the original employer's duty to recognize an established union during the certification year, *Brooks* v. *NLRB,* 348 U.S. 96, or, in light of the so-called "contract bar" rules, during the term of a collective agreement, *General Cable Corp.,* 139 NLRB 1123. And the Board has squarely recognized that its contract bar rules apply to successors. *Barrington Plaza,* 185 NLRB No. 132.[3]

The conclusion is therefore manifest that, in determining whether the employing industry survived, the Board and

---

[3] Naturally, as *Wiley* itself makes clear, the second employer's voluntary decision to utilize some or all of those who have been working at the employing industry is "evidence . . . of similarity and continuity of operation across the change in ownership" (376 U.S. at 551): For the employer's self-interest guarantees that such a decision is motivated by the fact that the transfer has not changed the nature of the work to be done. This does not mean that a majority of the second employer's work force must be drawn from his predecessor to support a successorship finding. In *Wiley,* the predecessor had a work force of forty employees. The successor had a work force of 340 employees, of whom forty had been in the predecessor's employ and successorship was found despite the fact that the predecessor's employees constituted a small minority of the successor's work force. The upshot is, as Judge Harold Leventhal stated, concurring in *IAM, District Lodge 94* v. *N.L.R.B.,* 414 F.2d 1135, 1140 (C.A. D.C.), that a finding of "full successorship" requires at the most "some retention of employees and a continuity of business purpose between the old and new enterprise."

the courts should look solely to changes which the employer could lawfully make under the agreement. If those alterations neither effect a fundamental redirection of the operation's basic aims, nor require employees possessing substantially different skills, a finding of successorship is required. For where the business retains its basic function, and the jobs remain essentially the same, the existing collective agreement will continue to fit the situation. And where that is so, the national labor policy requires that the contract continue in force.

CONCLUSION

For the above stated reasons, as well as those developed by the NLRB and the Union, the Board's decision should be enforced.

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IN THE

Supreme Court of the United States

October Term, 1971
Nos. 71-123 and 71-198

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

BURNS INTERNATIONAL SECURITY SERVICES, INC.

BURNS INTERNATIONAL SECURITY SERVICES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR BURNS INTERNATIONAL SECURITY SERVICES, INC.

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IN THE

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NATIONAL LABOR RELATIONS BOARD,
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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR BURNS INTERNATIONAL SECURITY SERVICES, INC.

Opinions Below.

The history of the opinions below is adequately set forth in the Board's Brief.*

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*The court of appeals action was entitled *"The William J. Burns International Detective Agency, Inc. v. NLRB."* After the court of appeals rendered its decision, The William J. Burns International Detective Agency, Inc., changed its name to "Burns International Security Services, Inc."

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Board's Brief.

Statutes Involved.

The relevant statutory provisions are adequately set forth in the Board's Brief.

Questions Presented.

1. In an unfair labor practice proceeding alleging a refusal to bargain may a sub-contractor, who was awarded a sub-contract to provide services at a facility, be held to be a successor of the previous sub-contractor and required to bargain with the union representing the previous sub-contractor's employees, where: (a) there was a total absence of dealings between the two sub-contractors; (b) the previous sub-contractor's performance at the facility constituted a small portion of its total business, the balance of which was not affected by the change of sub-contractors; (c) the performance of the sub-contract was integrated into the new sub-contractor's previously existing business; (d) there was a change in supervision at the facility by the new sub-contractor; and (e) within six months after the awarding of the sub-contract the previous sub-contractor's employees constituted less than a majority of employees employed at the facility?

2. Did the refusal of a sub-contractor, which was held to be a successor, to adopt, honor and enforce a collective bargaining agreement between the previous sub-contractor and the union representing the previous sub-contractor's employees constitute an unfair labor practice under the provisions of Sections 8(a)(5) and 8(d) of the Act, where there were no dealings between

the two sub-contractors and the successor sub-contractor did not consent to be bound by said agreement and was not a party to the negotiation thereof either by an agent or an alter ego?

Statement of the Case.

The Board's statement (Board Brief, p. 2, et seq.) requires some amplification.

Prior to July 1, 1967, plant protection services at the facility of Lockheed Aircraft Service Company, at Ontario International Airport, Ontario, California (herein the "Facility"), had been performed by The Wackenhut Corporation pursuant to a series of one year agreements between it and Lockheed. (Appendix, pp. 128; 129, 145.)* Wackenhut had employed 42 guards at the Facility. (Appendix, p. 76.) Lockheed was a prime Government contractor and as a result of Lockheed's Government contracts, Wackenhut Facility guards were required to obtain secret or top secret Government security clearances. (Appendix, p. 106; Appendix A, p. 27.)** Wackenhut guards were supervised by a supervisor who devoted approximately two-thirds of his time to the Facility; the balance of his time was devoted to different Wackenhut jobs. (Appendix A, pp. 23-24.)

Wackenhut's job at the Facility was one of the 200 to 300 plant protection jobs Wackenhut had in the State

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*The designation (Appendix, pp. 128, 129, 145) refers to pages 128, 129, and 145 of the Joint Appendix. Similar designations will be used herein.

**Relevant portions of the record herein were not included in the Joint Appendix. Such portions are attached hereto as Appendix A. The designation (Appendix A, p. 27) refers to page 27 of Appendix A. Similar designations will be used herein.

of California. (Appendix, p. 72.) All of Wackenhut's jobs in California (with the exception of a single job in Livermore, California) were supervised by its Director of West Coast Operations (herein the "Director") and his staff. (Appendix, pp. 70-71.) The Director reported to a vice-president who was located at Wackenhut's corporate headquarters in Coral Gables, Florida. (Appendix A, pp. 5, 6.) The Director's staff included the Manager of Physical Security, a coordinator, a personnel supervisor and eight area supervisors. (Appendix A, pp. 8-10, 28.) There were facility supervisors at approximately twenty-five percent of Wackenhut's jobs in California. (Appendix, p. 74.)

The Manager of Physical Security directly supervised the area supervisors and facility supervisors on all of Wackenhut's California jobs. (Appendix A, pp. 8-9.) The Coordinator coordinated the hiring of personnel and preparation of payrolls for all of Wackenhut's California jobs. (Appendix A, p. 10.) Each area supervisor was assigned to a specific geographic area and was responsible for the direct supervision of guards in his area. (Appendix A, p. 12.) The area supervisors hired, trained and disciplined guards. (Appendix A, pp. 12-14.) The personnel supervisor maintained personnel records, handled industrial relations and obtained security clearances for all Wackenhut guards in California. (Appendix A, p. 28.)

The wage rates, fringe benefits and working conditions of the Wackenhut guards in California were uniform and were established at Wackenhut's corporate headquarters. (Appendix, pp. 72-73.) All Wackenhut guards in California received a guard manual which had been prepared at its corporate headquarters. (Ap-

pendix A, pp. 7, 16.) The manual specified the basic duties and general orders for guards. (Appendix A, pp. 7-8.) Permanent personnel records, uniforms and supplies for Wackenhut guards in California were kept at Wackenhut's Los Angeles Office. (Appendix A, pp. 7, 22-23, 24-25.)

On March 8, 1967, following a Board conducted election,* United Plant Guard Workers of America and its Amalgamated Local Union No. 162 (herein "UPGWA"), was certified as the bargaining representative of the Wackenhut guards at the Facility. (Appendix, p. 146.)** Thereafter, Wackenhut and UPGWA entered into a collective bargaining agreement effective from April 29, 1967, until April 28, 1970 (herein the "Wackenhut agreement"). Among other things, the Wackenhut agreement provided a procedure to resolve any "justifiable complaint or grievance." The last step of said procedure was final and binding arbitration before an impartial arbitrator. (Appendix, pp. 152-154.)

On July 1, 1967, following competitive bidding, and pursuant to a sub-contract with Lockheed, Burns replaced Wackenhut as the sub-contractor performing plant protection services at the Facility. (Appendix, pp. 127, 135, 145.) Burns was in the business of providing

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*The election was conducted pursuant to a Stipulation For Certification Upon Consent Election. (Appendix p. 22.) Burns was not a party to said Stipulation, and no hearing was held regarding the appropriateness of the bargaining unit. (Appendix, pp. 37-39.)

**The bargaining unit included: "All full-time and regular part-time employees of Wackenhut performing plant protection duties as determined in Section 9(b)(3) of the Act at Lockheed, Ontario International Airport"; and excluded: "Office clerical employees, professional employees, supervisors and all other employees as defined in the Act." (Appendix, p. 17.)

plant protection services to companies throughout the United States. Burns had a nation-wide organization which was divided into divisions, branches and finally sub-offices. (Appendix, p. 184.) The Facility was located in the area supervised through the Ontario Sub-office* (herein the "Sub-office"). The Sub-office was within the Los Angeles Branch, and the Pacific Coast Division. (Appendix, pp. 91, 184.) The Sub-office was established before Burns was awarded the Facility subcontract by Lockheed. (Appendix, p. 93.) Burns utilized the Sub-office to supervise approximately 30 jobs in addition to the Facility job. (Appendix, p. 90.) Within the Burns organization that had responsibility for the Facility job was the Division Manager of the Pacific Coast Division, the Los Angeles Branch Manager, and the Sub-office Manager. (Appendix, p. 184.) On the Sub-Office Manager's staff were an Operations Supervisor and three field supervisors. (Appendix, pp. 89, 91-92.) The Operations Supervisor was the principal assistant of the Ontario Sub-office Manager, and directly supervised the field supervisors. (Appendix, p. 91.) The field supervisors regularly visited and supervised Burns guards on each job in the Sub-office area. (Appendix, pp. 91-92.) After July 1, 1967, Burns' performance at the Facility became part of the jobs for which such personnel were responsible. (Appendix, pp. 92-94.)

Burns had a communications system whereby a guard on each job reported to the Sub-office on an hourly basis. Job problems would then be brought to the at-

*As used hereinafter the terms "Sub-Office" and "Sub-Office area" shall refer to the area supervised through the Ontario Sub-Office excluding Los Angeles County. Burns guards in Los Angeles County were represented by the American Federation of Guards. (Appendix, p. 178.)

tention of a field supervisor through a radio network. Thus, any field supervisor could be called upon to handle a problem at any job in the Sub-office area. (Appendix, p. 92.)

On July 1, 1967, Burns employed 42 guards at the Facility, 27 of whom were former Wackenhut guards, and 15 of whom were Burns guards who had been transferred to the Facility from other Burns jobs. (Appendix, p. 146.) Burns employed former Wackenhut guards because they had the required Government security clearances. (Appendix, pp. 100, 106.) Burns did not employ Wackenhut's supervisor. Instead, it employed a full-time supervisor for the Facility.*

All Burns guards within the Sub-office area had the same pay scales, vacations, working conditions, hospitalization plan, fringe benefits, and guard manual. (Appendix, pp. 95, 97-99.) Such guards were subject to the same disciplinary procedures, general orders, and rules and regulations of personnel conduct. (Appendix, pp. 95, 99.) Burns had a personnel manager who maintained personnel records, prepared payrolls, conducted background investigations, supervised guard training and conducted terminal interviews for all guards within the Sub-office. (Appendix, pp. 95-96.) Master personnel records for all of Burns guards in the Sub-office area were kept at the Los Angeles Branch, with duplicate personnel records at the Sub-office. Personnel records were not kept, nor were payroll checks prepared at the Facility. (Appendix, pp. 96, 97-98.) Guards in the Sub-office area were recruited by the Ontario Man-

*Prior to July 1, 1967, said supervisor had been one of the Wackenhut guards at the Facility, but had not held a supervisory position. (Appendix, p. 94.)

ager, the Operations Supervisor and Los Angeles Branch Office personnel. (Appendix, pp. 95-96.) Uniforms and other equipment and supplies of the guards were purchased and maintained at the Sub-office, and were not purchased or maintained at the Facility level. (Appendix, p. 97.)

It was Burns practice within the Los Angeles Branch to transfer guards, both temporarily and permanently from one job to another. (Appendix, p. 99.) There were at least 100 temporary transfers per week and 500 to 600 permanent transfers per year. (Appendix, pp. 99-100.) Such practice of interchange had impact on the Facility work force. Within six months after Burns commenced performing, Burns employed 52 guards at the Facility; 23 of whom were transferred thereto from other Burns jobs, 8 of whom were new hires, and 21 of whom were former Wackenhut guards. By December 31, 1968, there were 49 Burns guards at the Facility; 32 were transferred from other Burns jobs, 4 were new hires, and 13 were former Wackenhut guards. (Only 9 former Wackenhut guards worked full time.) By October 31, 1969, there were 29 Burns guards at the Facility; 18 were transferred from other Burns jobs, 2 were new hires, and 9 were former Wackenhut guards. (Only 7 former Wackenhut guards worked full time.) (See Appendix, pp. 30-35.)

The Board held that Burns was Wackenhut's successor, and therefore was required to recognize UPGWA as exclusive representative of Facility guards. The Board also held that Burns, as a successor employer, was required to adopt, honor and enforce the Wackenhut agreement, and failure to do so was an unfair labor practice in violation of Section 8(a)(5) of the Act. Insofar as is relevant herein, the court of appeals af-

firmed that part of the Board's order holding that Burns was Wackenhut's successor; and therefore was required to recognize UPGWA as exclusive representative of its Facility employees. However, the court of appeal denied enforcement of that part of the Board's order which required Burns to adopt, honor and enforce the Wackenhut agreement.

Summary of Argument.

It will be shown herein that the court of appeals' enforcement of that portion of the Board's decision requiring Burns—as a successor employer—to recognize and bargain with the UPGWA should be reversed. The court's judgment enforcing such order was based upon its conclusion that the employing industry, which according to the court consisted of the Facility operations of Wackenhut and Burns, remained unchanged in spite of the change in plant protection sub-contractors. While the Board and the courts have enumerated the relevant factors for determining whether an employing industry has changed, there has been a failure to define the criteria for determining the entity to be analyzed for the presence of such factors.

It will be shown that the Facility operations of Burns and Wackenhut were not employing industries because such operations were not viable business entities. Important business decisions of Burns and Wackenhut, as well as decisions affecting their Facility employees, were not made at the Facility level. The Facility operations of Burns and Wackenhut were integrated into and were indistinguishable parts of larger business entities. Only by considering Burns' business in the Sub-office area, and Wackenhut's business in California, as employing industries is it possible to properly: (a) evaluate whether

the employing industry changed as a result of the award to Burns of the Facility sub-contract, and (b) preserve the protected rights of Facility employees to be represented by agents of their own choice. It will be shown that the employing industry was substantially changed when Burns began performing at the Facility.

If the Court determines that Burns was not Wackenhut's successor, it will not be necessary to consider the issue of whether Burns was bound by the Wackenhut agreement. However, assuming *arguendo* that the Court does find that Burns was Wackenhut's successor, it will be shown that the court of appeals was correct in its refusal to enforce that portion of the Board's order that required Burns to adopt, honor and enforce the Wackenhut agreement. The Board's order on the contract issue is contrary to Section 8(d) and legislative history of the Act which forbids imposing a collective bargaining agreement upon a non-consenting party. Further, such order is contrary to *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970). The court of appeals correctly held that enforcement of the Board's order on the contract issue would create serious inequities.

The Board's decision on the contract issue was based upon its broad and unwarranted expansion of *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). The Board failed to perceive that *Wiley*, which was decided as part of the federal law favoring arbitration as the most desirable means for resolving industrial disputes, could not be expanded to apply in an unfair labor practice case because of the proscription of Section 8(d) of the Act.

ARGUMENT.

I.

THE FACILITY OPERATION WAS NOT AN EMPLOYING INDUSTRY UNDER EITHER BURNS OR WACKENHUT; AND, THEREFORE WHEN BURNS COMMENCED PERFORMING AT THE FACILITY THERE WAS NO CONTINUITY OF AN EMPLOYING INDUSTRY.

Since *NLRB v. Colten,* 105 F.2d 179 (6th Cir. 1939), there have been numerous decisions concerning the survival of statutory duties under the Act after a change of employer. In *NLRB v. Colten,* the respondent argued that because the death of a partner had dissolved an employer which was organized as a copartnership, the affirmative provisions of a Board order directing reinstatement of certain employees and the payment of back wages, became inoperative. The court articulated for the first time, but did not define, the concept of "the employing industry." The court found that the change of employers had not affected the employing industry, and held that the Board's order remained in force in spite of the dissolution of the partnership.

Subsequent to *NLRB v. Colten,* this Court in *Southport Petroleum Co. v. NLRB,* 315 U.S. 100 (1942) considered the plea of an employer who argued that because of a change in corporate ownership, it was not bound by a Board order remedying unfair labor practices which had been committed by the employer under its previous ownership. The Court, in rejecting the employer's contention stated:

> ". . . If there was merely a change in name or in apparent control there is no reason to grant the petitioner relief from the Board's order of reinstatement; instead there is added ground for com-

> pelling obedience. *Whether there was a bona fide discontinuance and a true change of ownership—which would terminate the duty of reinstatement created by the Board's order—or merely a disguised continuance of the old employer, does not clearly appear,* and accordingly is a question of fact properly to be resolved by the Board on direct resort to it, or by the court if contempt proceedings are instituted.". (Emphasis added.) (315 U.S. at 106.)

The clear implication in *Southport Petroleum Co. v. NLRB* is that where there is a bona fide discontinuance of the manner in which a business is conducted, together with a true change in ownership, a Board's remedial order will not apply to the new owner.*

The Board and the courts have centered their analysis in successorship cases on the employing industry. However, there has been a total failure to articulate exactly what an employing industry is. Such failure has caused confusion as to the criteria for determining the entity to analyze when deciding whether there has been a change in the employing industry.

In the instant case, the court of appeals and the Board assumed that Wackenhut's and then Burns' operations at the Facility were employing industries. Before this Court, the Board's Counsel urges that the employing industry is—"the provision of guard service for Lockheed at the airport." (Board Brief, p. 15.) Neither the court below, the Board, nor the Board's Counsel

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**Cf. Perma Vinyl*, 164 N.L.R.B. 968 (1967), *enforced sub nom., United States Pipe and Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968).

have indicated any reason why the "employing industry" should be so narrowly defined. Indeed, focusing upon the Facility operations of Burns and Wackenhut as employing industries frustrates the purposes of the Act. Such a narrow definition of the employing industry precludes a realistic evaluation of impact of the change sub-contractors on: (a) the employees involved; and, (b) the relationship of the Facility sub-contract to the overall operations of Wackenhut and Burns. In addition, isolating the Facility operation as an employing industry will fragment Burns' business conducted through the Sub-office, and impair Burns' ability to operate efficiently.

In order to accomplish the purposes of the Act, when applying the successorship doctrine, it is essential that the entity considered the employing industry be an "industry"—a business within which are the managerial authority and skill which are necessary to both run a business and to make decisions on matters that are critical to employees, i.e., wages, hours and working conditions, industrial relations policies and practices, and the resolution of employee grievances. An employing industry is more than an appropriate bargaining unit.* It will be shown that the Facility operation of Burns and Wackenhut did not meet these criteria.

Prior to July 1, 1967, Burns and Wackenhut had separate and substantial business organizations through which they provided plant protection services, as business competitors. Indeed, with respect to the Facility,

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*In selecting an appropriate bargaining unit the courts primarily consider the ability of managers within the unit to make decisions on matters which would be the subjects of collective bargaining. See, e.g., *NLRB v. Solis Theatre Corp.*, 403 F.2d 381, 383 (2d Cir. 1968); *NLRB v. Davis Cafeteria, Inc.*, 396 F.2d 18, 20 (5th Cir. 1968).

Burns began providing services pursuant to a sub-contract which it received after competitive bidding. Such sub-contract commenced upon the termination by Lockheed of its sub-contract with Wackenhut. It is clear and undisputed that: (a) Burns is not Wackenhut's *alter ego;* (b) all transactions between Lockheed and Wackenhut, and Lockheed and Burns were conducted in good faith; and (c) there were no dealings between Wackenhut and Burns.

Wackenhut's Facility sub-contract was merely one out of between 200 or 300 similar contracts to provide plant protection services in California. All of Wackenhut's contracts were supervised by the Director and his staff. Wage rates, fringe benefits and working conditions of all Wackenhut guards in California, including those at the Facility, were established at Wackenhut's corporate headquarters. Wackenhut Facility guards shared common supervision with guards at other Wackenhut jobs. Personnel records, labor relations handling, preparation of payrolls, and coordination of hiring of all Wackenhut guards in California, including those at the Facility, were controlled by the Director and his staff.

On July 1, 1967, Burns integrated the performance of its Facility sub-contract into its already existing business, which involved 30 other plant protection contracts, in the Sub-Office area. The Facility operation was added to the responsibility of the Sub-Office Manager and his staff. Facility guards under Burns worked for different supervisors, and became subject to the same working conditions, pay scales and fringe benefits as other Burns guards in the Sub-Office area. Personnel records, labor relations, payrolls, and supervision of Facility guards were handled in common with other guards in the Sub-Office area.

Under Burns, the Facility guards became subject to Burns existing practice of frequently interchanging Burns guards from one Burns job to another, both temporarily and permanently. Under Wackenhut, interchange had been minimal. (Appendix A, pp. 17-18, 21-22.) Pursuant to Burns practice of interchanging guards, on July 1, 1967, while initially staffing its Facility guard force, Burns transferred 15 guards to the Facility from its other jobs. Such guards constituted more than one-third of the Facility guards. Within six months, and thereafter, as a result of employee interchange and new hires, former Wackenhut guards consisted less than a majority of Facility guards.

After July 1, 1967, except for the Facility job, Wackenhut's overall business in California was unaffected by Lockheed's termination of its Facility sub-contract. Similarly, the only difference in Burns' overall business in the Sub-Office area after July 1, 1967, was the addition of the Facility sub-contract.

Under both Burns and Wackenhut, the Facility operation was not a viable business entity. None of the important decisions that affected the conduct of the business and had impact on employees was made at the Facility level. Wackenhut's Facility sub-contract was integrated into and was an indistinguishable part of its entire California business. Under Burns, the Facility sub-contract was integrated into and was an indistinguishable part of the Sub-Office business. The significant aspects of the employment of Facility guards were dependent upon the organization they were employed by rather than the particular location of the post to which they were assigned.

The performance of plant protection services at the Facility was not an employing industry. Prior to July 1,

1967, the employing industry was Wackenhut's business in California. Thereafter, the employing industry was Burns' business in the Sub-Office area. Therefore, on the Facility level, there was no continuity in the employing industry after July 1, 1967. Rather, the change in sub-contrators constituted a substantial change in the employing industry.

The instant case is legally indistinguishable from *NLRB v. Alamo White Truck Service, Inc.*, 273 F. 2d 238 (5th Cir. 1959), where the court refused to enforce a Board bargaining order which was based upon the same type of myopic analysis that occurred herein. The original employer ("White") was a national manufacturer of trucks which operated a retail branch, composed of several departments, in San Antonio, Texas. White closed the branch, and entered into an agreement with its principal salesman who established an independent business ("Alamo") to service and sell trucks under a local retailership agreement. Alamo purchased White's inventory of parts, tools, shop and office equipment. It used White's building under a one year lease for the servicing of trucks and retained one of White's supervisors as well as eight of the fourteen employees of White. Thus, when Alamo commenced business a majority of its work force consisted of former White employees who were engaged in the same work, at the same location and under the same supervision.* The court concluded that Alamo was a different business than White, and therefore the employing industry had changed. The court noted:

> "Alamo did not purchase the accounts receivable. It did not assume any of the indebtedness or obligations of the old factory branch. It did not ac-

*See *Alamo White Truck Service, Inc.*, 122 N.L.R.B. 1174 (1959).

> quire any of White's books and records. A new system of bookkeeping was installed. . . . Alamo arranged for its own insurance with companies which were not the same as those that had carried White's insurance. . . . Alamo obtained a new Texas business license. Alamo employed a different method of financing the sale of automotive equipment." (273 F.2d at 241.)

In addition, the court based its holding upon the fact that Alamo did not operate all the departments that had previously been operated by White, and that there had been a change from a national to a local business.

Just as Alamo did not operate all of White's departments, Burns did not take over all of Wackenhut's contracts in California. Neither Burns nor Alamo purchased accounts receivable, books, records, or assumed obligations. Under Burns, the Facility job became part of the Sub-Office business which covered a small portion of the area and approximately ten percent of the number of jobs encompassed in Wackenhut's business. Thus, even though both Wackenhut and Burns are national organizations, like Alamo, Burns brought more localized supervision of the Facility guards than there had been under Wackenhut.* *Accord, Machinists v. NLRB,* 414 F.2d 1135 (D.C. Cir. 1969), cert. denied 397 U.S. 935 (1970); and *NLRB v. Aluminum Tubular Corp.,* 299 F.2d 595 (2d Cir. 1962).

The instant case is also similar to *Northwest Galvanizing Co.,* 168 N.L.R.B. 26 (1967), where the Board found that there had been a change in the em-

*In *Alamo White Truck Service, Inc.,* 122 N.L.R.B. 1174, 1176 (1959), the Board had held that Alamo was a successor because a majority of employees of Alamo were former White employees, who did the same work, at the same location, under the same supervision, as they had for White.

ploying industry. Northwest purchased a complete operation which had been a division of the seller; and then continued substantially the same operation at the seller's site, pending completion of a new building. Northwest agreed to: (a) perform the seller's work for five years; (b) complete its pending orders; (c) employ the seller's employees, including a foreman; and (d) retain the seller's superintendent for 90 days. The purchased operation was thereafter moved to a new building, and intergrated into Northwest's existing operation. When this occurred the employees of the seller were dispersed through the Northwest's plant. Northwest was held not to be a successor, because it did not acquire a business, but rather, purchased an operation for addition to its already existing business. The Board noted that the additional operation was integrated into Northwest's existing business, rather than continued as the seller's operation. Accord, *Federal Electrical Corp.*, 167 N.L.R.B. 469 (1967).

As in *Northwest Galvanizing Co., supra,* Burns did not simply take over Wackenhut's business. It was awarded a sub-contract by Lockheed, the performance of which was executed as part of its total business in the Sub-Office. Just as *Northwest Galvanizing* integrated the acquired operation into its total business, Burns integrated its Facility sub-contract into its business in the Sub-Office. Northwest was not a successor, and neither was Burns.

Lincoln Private Police, Inc., 189 N.L.R.B. No. 103, 76 L.R.R.M. 1727 (1971) is another Board decision which is irreconcilable with the decisions herein. In *Lincoln Private Police, Inc.*, Industrial Security Guards, Inc. ("Industrial") was an employer that provided plant protection services. Industrial ceased doing business, and Lincoln, an employer which also provided plant pro-

tection services, solicited and obtained 42 percent of Industrial's former customers. Lincoln did not assume any of industrial assets or liabilities. It used its own uniforms, vehicles, equipment and offices. Another employer which also provided plant protection services, also obtained a substantial percentage of Industrial's former customers. Lincoln's work force consisted of 66 employees, 61 of whom were former Industrial employees who continued to work at the location of the same customer, at the same post they worked at under Industrial. The Board held that Lincoln did not violate the Act when it refused to bargain with the union that represented Industrial's employees in a city-wide bargaining unit.

In both the instant case and *Lincoln Private Police, Inc.*, there were no dealings between the alleged successor and predecessor—instead plant protection agreements were obtained through direct solicitation of customers. In both cases, there was no assumption of assets or liabilities; and different uniforms, vehicles and equipment were used. Both Lincoln and Burns acquired less than a majority of the alleged predecessor's customers. Indeed, Lincoln took over 42 percent of Industrial's former customers, while in the instant case Burns took over less than one percent of Wackenhut's former customers. (One customer out of 200-300 Wackenhut customers.)*

The cases cited by the Board's counsel are inapposite. Such cases did not consider the problem created

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*The Board's counsel argues that *Lincoln Private Police, Inc., supra,* is distinguishable because Industrial's business was divided among several firms—"with the alleged successor acquiring less than a majority of the prior employer's customers." (Board Brief, p. 19.) However, the Board's counsel fails to mention that 61 of 66 of Lincoln's employees were former union members who worked at the same post as they did for Lincoln.

by the transfer of an operation—which was not in itself a business entity but instead had been part of a business—and the integration of such operation into another business. Indeed, the cases the Board's counsel relies upon militate against considering the Facility operation an employing industry, as they all involved situations where there was a transfer of a complete business entity which remained virtually intact after the change in ownership.

For example, *NLRB v. Zayre Corp.*, 424 F.2d 1159 (5th Cir. 1970), the successor purchased the assets of a discount department store which had previously been operated as an independent unit. The successor then continued to operate the same discount department store on the same premises. Both before and after the change in ownership, the store remained a viable business entity—"a retail discount house." In *NLRB v. Armato,* 199 F.2d 800 (7th Cir. 1952), the successor leased the building, machinery and fixtures of a business which manufactured and sold metal products. It also purchased raw materials, goods in process and finished goods. Further, the successor kept most of the original owner's customers. Both before and after the change in ownership there was a complete business entity which had been engaged in the manufacture and sale of metal products. Similarly, *NLRB v. Ideal Laundry Corp.*, 422 F.2d 801 (10th Cir. 1970); *NLRB v. Quaker Tool & Die, Inc.*, 403 F.2d 1021 (6th Cir. 1968); *Makela Welding Inc. v. NLRB*, 387 F.2d 40 (6th Cir. 1967); *Overnite Transportation Co. v. NLRB*, 372 F.2d 765 (4th Cir.), cert. denied 389 U.S. 838 (1967); *NLRB v. Auto Ventshade, Inc.*, 276 F.2d 303 (5th Cir. 1960) and *Chemrock Corp.*, 151 N.L.R.B. 1074 (1965) involved the change in ownership by sale or lease of stock or assets of business entities.

The two cases relied upon by the Board's counsel which involve changes in contractors are also inapposite. *Tom-A-Hawk Transit Inc. v. NLRB*, 419 F.2d 1025 (7th Cir. 1969) involved a situation where a company that operated the public transportation bus system for an entire city under an exclusive franchise ceased doing business. An identical franchise was then granted to Tom-A-Hawk, a company whose entire business was providing bus service to the same city. The successor and predecessor utilized basically the same employees. Thus, even though there had been no dealings between the two companies, it is clear that they were both operating virtually identical business enterprises. The same is true of *Maintenance, Inc.*, 148 N.L.R.B. 1299 (1964), which involved a change in custodial contractors at a plant of NASA in Huntsville, Alabama. There was no indication that either the predecessor or the successor performed work at any other location, or that the work at the Huntsville location, which utilized approximately 250 custodial employees, was performed as part of a larger business operation by either the successor or the predecessor.

It is submitted that the change in sub-contractors from Wackenhut to Burns caused a substantial change in the employing industry of Facility guards. Under Burns, Facility guards became subject to a different management—both with respect to structure and individuals. Under Burns, the Facility operation was directly supervised through the Sub-Office which was part of the Los Angeles Branch and Pacific Coast Division. Wackenhut had no sub-office, branch or division. Instead it had a single California business. Burns and Wackenhut had different supervisors and different practices and procedures both with respect to labor relations and business conduct. From a business standpoint,

except for the Facility, Burns and Wackenhut did not operate at the same location, they had different customers, utilized different offices, equipment, procedures and uniforms. Burns did not take over a majority of Wackenhut's total employee complement in California. Indeed, former Wackenhut employees did not constitute a majority of Burns employees in the Sub-Office area. Even at the Facility, as a result of interchange and new hires, within six months after July 1, 1967, former Wackenhut guards constituted less than a majority of Burns Facility employees.

The successorship doctrine is designed to protect employees from the adverse effects of a change in ownership which has little substantive effect on the enterprise by which they are employed, while at the same time enabling such employees to select bargaining agents of their own choice to deal with the employer. Since the employing enterprise was substantially changed, Burns Facility employees had the right to decide anew whether they wished to be represented by a union. See the opinion of the court by then Circuit Judge Burger in *Machinists v. NLRB*, 414 F.2d 1135, 1138 (D.C. Cir. 1969), cert. denied 397 U.S. 935 (1970).*

The decision below will have an adverse impact upon Facility employees and Burns. Such decision will impair Burns ability to operate its business in the most efficient manner. Burns policy of interchanging em-

*Before the court of appeals, Burns did not contest the portion of the Board's order that relates to alleged violations of Sections 8(a)(1) and (2) of the Act by unlawfully assisting and recognizing the American Federation of Guards. There is uncontradicted testimony that Burns has never bargained collectively with the American Federation of Guards with respect to the Facility. (Appendix, p. 107.) In addition, since there was no claim that Burns discriminated with respect to the employment of Facility guards, Burns has not petitioned for review of that portion of the court of appeals order covering the Section 8(a)(1) and (2) violation.

ployees on a temporary and permanent basis to meet the needs of the business will be jeopardized. It is also possible that future application of such decision could cause a multiplicity of unions throughout the Sub-Office area which would tend to further fragment the Sub-Office business, and reduce Burns ability to maintain the Sub-Office as a single integrated and efficient operation. Such multiplicity of unions could also cause industrial strife by increasing the number of jurisdictional disputes between the various unions. The jobs of Facility guards are most secure if Burns is able to provide Lockheed efficient and competent plant protection services. Any decision which tends to reduce efficiency is contrary to the interest of Burns employees, Burns, and the economy in general.

This Court should reverse the judgment of the court of appeals that Burns was Wackenhut's successor, and was therefore required to recognize and bargain with UPGWA.

II.

EVEN IF BURNS WERE WACKENHUT'S SUCCESSOR, ITS REFUSAL TO ADOPT, HONOR AND ENFORCE THE WACKENHUT AGREEMENT DID NOT VIOLATE SECTIONS 8(a)(5) AND 8(d) OF THE ACT.

In the instant case, the Board reversed the long standing rule of law that a successor employer is not bound by its predecessor's collective bargaining agreement, unless it agrees to assume such agreement. (See, e.g., *Rohlik, Inc.*, 145 N.L.R.B. 1236, 1242 n. 15 (1964).) The Board, for the first time held that a successor employer is, as a matter of law, bound by its predecessor's collective bargaining agreement, and that the refusal of a successor to adopt, honor and enforce said agreement violates Sections 8(a)(5) and

8(d) of the Act. The Board has thereby created a new unfair labor practice.

In holding that Burns was bound by the Wackenhut agreement, the Board relied upon this Court's decision in *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964) (herein "*Wiley*"). The court of appeals below refused to enforce the portion of the Board's order related to the Wackenhut agreement, holding that said order was proscribed by Section 8(d) and the policy of the Act against imposing agreements upon non-consenting parties. In addition, the court of appeals held that the Board order violated this Court's decision in *H. K. Porter Co., Inc. v. NLRB,* 397 U.S. 99 (1970) (herein "*H. K. Porter*"). The court of appeals found that *Wiley* was inapposite.*

A. The Board Does Not Have the Power to Hold That Burns' Refusal to Adopt, Honor and Enforce the Wackenhut Agreement Violated Sections 8(a)(5) and 8(d) of the Act.

The original National Labor Relations Act (Act of July 5, 1935, ch. 372, 49 Stat. 449) did not vest the authority to enforce collective bargaining agreements in either the Board or the courts. Indeed, little consideration was given to a proposed section that would have made the breach of a collective bargaining agreement an unfair labor practice.**

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*Cf. *Ranch-Way, Inc. v. NLRB,* 445 F.2d 625 (10th Cir. 1971), *cert. pending,* Docket No. 71-589.

**See Comparison of S. 2926 and S. 1958, 1 Legis. Hist. of NLRA 1319, 1337, in which it is reported that William H. Davis recommended that Section 8 be amended to add the following language:

> "It shall be an unfair labor practice for either party to an agreement that has been registered pursuant to Section 12 of this Act, to violate or fail to observe any condition of such agreement."

Such language was not included in any of the versions of the bill.

The legislative history of the adoption of the Act in 1947 clearly demonstrates that Congress intended to restrict the Board's powers concerning collective bargaining agreements. The Senate bill* contained Section 8(d), Section 301, and a Section 8(a)(6). Section 8(a)(6), which was ultimately rejected by Congress, made it an unfair labor practice for an employer:

> "[T]o violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration. . . ."**

The Report of Committee of Conference of both Houses gave the following reason for rejecting Section 8(a)-(6):

> ". . . The conference agreement omits this provision of the Senate amendment. *Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual*

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*S. 1126, As Reported, 1 Legislative History of the Labor Management Relations Act 99, 111, 114, 151 (herein "Legis. Hist. LMRA"), and in the House version as passed by the Senate, H.R. 3020, As Passed Senate, 1 Legis. Hist. LMRA 226, 239, 242, 279.

**The view of the Senate minority, which opposed Section 8(a)(6) and ultimately prevailed, was that:

> ". . . [This] proposal . . . [Section 8(a)(6)] contain[s] no provision requiring the disputants to utilize procedures prescribed by their collective-bargaining agreement or to exhaust mediation and conciliation processes prior to resort to the Board. . . . [R]esort to these is not required as a condition precedent to filing a charge of an unfair labor practice for breach of a collective-bargaining agreement.
>
> *"The effect of this omission would be to discourage the voluntary adjustment of disputes and unnecessarily increase the number of cases coming before the Board.* . . . The results, therefore, might well be a disuse of the collective-bargaining process and a congestion of cases before the Board which would make it impossible to settle disputes promptly in an area where prompt settlement is essential to the cause of industrial peace." Senate Minority Report No. 105, Pt. 2, On S. 1126, 1 Legis. Hist. LMRA 463, 474-75. (Emphasis added.)

processes of the law and not to the National Labor Relations Board." House Conf. Rep. No. 510 On H.R. 3020, 1 Legis. Hist. LMRA 505, 546. (Emphasis added.)

The purpose of Section 301 was to make both unions and employers equally amenable to a federal court action for breach of a collective bargaining agreement. See, e.g., House Report No. 245 On H.R. 3020, 1 Legis. Hist. LMRA 292, 297; Remarks of Senator Smith, 92 Cong. Rec. 4410 (1947), 2 Legis. Hist. LMRA at 1145-1146.

The Court in *H. K. Porter* recounted this history as follows:

"The object of . . . [the Act] was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement. This fundamental limitation was made abundantly clear in the legislative reports accompanying the 1935 Act. The Senate Committee on Education and Labor stated:

" 'The committee wishes to dispel any possible false impression that this bill is designed

to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.' " (397 U.S. at 103-04.)

In *H. K. Porter*, the Court observed that in 1947, when Congress reviewed the experience under the National Labor Relations Act, it noted the Court's language in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937), where the Court had stated that the Act does not compel agreements. Referring specifically to *NLRB v. Jones & Laughlin Steel Corp.*, the House Committee Report accompanying the Act stated:

" 'Notwithstanding this language of the Court, the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. . . .

. . . .

" '[U]nless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective-bargaining agreements.' " (397 U.S. at 105-106.) (Footnotes omitted.)

As a result of the fear of Board action to regulate the terms of collective bargaining agreements, Section 8(d) was added to the Act, with the condition that

the duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." With respect to Section 8(d), the Court in *H. K. Porter* stated:

> "The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions." (*Id.* at 103.)

In *H. K. Porter*, the Board had held that an employer violated Section 8(a)(5) of the Act by adamantly refusing to agree to a dues checkoff provision, intending thereby to frustrate the consummation of any collective bargaining agreement. The Board had ordered the employer to "'[g]rant to the Union a contract clause providing for the checkoff of union dues.'" *Id.* at 102. The Court, agreeing that the employer violated Section 8(a)(5), held that because of Section 8(d) and the legislative history of the Act:

> "[W]hile the Board does have the power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." (*Id.* at 102.)

The Court said:

> "*It would be anomalous indeed to hold that while § 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute.* The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of

> the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based —private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." (*Id.* at 108.) (Emphasis added.)

Even before *H. K. Porter,* limitations on the Board's power with respect to collective bargaining agreements had been delineated. The Board does not have the plenary authority to enforce collective bargaining agreements. *NLRB v. Strong,* 393 U.S. 357, 360 (1969); *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 513 (1962). In *NLRB v. American National Insurance Co.,* 343 U.S. 395 (1952), the Board had found an employer's continued insistence on the inclusion of a broad management rights clause a violation of Section 8(a)(5). The Board ordered the employer to refrain from further insistence on this clause. The court of appeals refused to enforce the Board's order, concluding that the employer was not precluded from further bargaining for such a clause. This Court affirmed, stating:

> "[T]hat the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (343 U.S. at 404.)

In *Teamsters, Local 357 v. NLRB,* 365 U.S. 667, 676-77 (1961), this Court overturned the Board's holding that the inclusion of a hiring hall provision

in a collective bargaining agreement was a *per se* violation of Section 8(a)(5), and stated:

> "Moreover, the hiring hall, under the law as it stands, is a matter of negotiation between the parties. The Board has no power to compel directly or indirectly that the hiring hall be included or excluded in collective agreements."*

On the basis of the foregoing, the court of appeals below, in an opinion by Circuit Judge Paul R. Hays, correctly held that the Board's decision that Burns must adopt, honor and enforce the Wackenhut agreement violated Section 8(d) and the legislative history of the Act. In addition, the court of appeals held:

> ". . . The action of the Board in this case is contrary to the letter as well as the spirit of the Supreme Court's recent decision in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) . . ." (Appendix, p. 190.)

It is significant that even though *H. K. Porter* was decided before the Board's decision herein, it was not cited by the Board. However, subsequent to the Board's decision below, the Board did consider *H. K. Porter*. In *Ex-Cell-O Corp.*, 185 N.L.R.B. No. 20, 74 L.R.R.M. 1740 (1970), *enforced on other grounds, Ex-Cell-O Corp. v. NLRB*, ... F.2d ....., 77 L.R.R.M. 2547 (D.C. Cir. 1971), the employer had clearly violated Section 8(a)(5) and 8(d) of the Act by its refusal to

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*Accord: *Steelworkers v. NLRB*, 390 F.2d 846, 853 (D.C. Cir. 1967), *cert. denied* 391 U.S. 904 (1968); *Retail Clerks v. NLRB*, 373 F.2d 655 (D.C. Cir. 1967); *Siskin Steel and Supply Co.*, 160 N.L.R.B. 1038, 1040 (1966); *Hyde's Super Market*, 145 N.L.R.B. 1252, 1253, enforced 339 F.2d 568 (9th Cir. 1964); *United Telephone Co. of the West*, 112 N.L.R.B. 779, 782 (1955).

bargain in good faith. The Trial Examiner, as a remedy for this violation, ordered the employer to pay the employees involved the benefits which the Trial Examiner concluded they would have received if the employer had bargained in good faith. The Board, while agreeing that an unfair labor practice had been committed, set aside the Trial Examiner's order, holding that *H. K. Porter* prevented it from ordering an employer to "accept full responsibility" for an agreement to which the employer had not agreed. In contrast, in the instant case the Board ordered Burns to accept full responsibility for the Wackenhut agreement—to which it had not agreed. The Board's decision in *Ex-Cell-O* is irreconcilable with its holding herein.*

The Board's action herein went beyond what was declared improper by this Court in *H. K. Porter* and by the Board in *Ex-Cell-O*. Obviously, since the Board lacks the power to order agreement to, or compliance with, a specific provision of a collective bargaining agreement, and since the Board lacks the power to order the proposal of or the non-insistence upon a specific provision of a collective bargaining agreement, it follows that the Board lacks the power to order agreement to and compliance with, an entire collective bargaining agreement. The Board's order that Burns fully accept the Wackenhut agreement is tantamount to enactment

*In *Electrical Workers v. NLRB*, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970), the court held that in the case of "a flagrant" violation of the Act the Board had the power under Section 10 to enforce an order which was similar to the order ruled improper in *Ex-Cell-O*. The Board in *Ex-Cell-O* expressed its disagreement with *Electrical Workers v. NLRB*, and continues to follow its decision in *Ex-Cell-O*. Further, no other court of appeals has followed *Electrical Workers v. NLRB*.

by the Board of the rejected Section 8(a)(6), and is directly contrary to Congressional intent.* The anomaly this Court referred to in *H. K. Porter* of the Board being prohibited from relying on a refusal to agree as the sole evidence of bad faith bargaining while being permitted to compel agreement in the same dispute has occurred. (See 397 U.S. at 108.) Burns' refusal to agree to the Wackenhut agreement is the only evidence the Board relied on in finding a separate violation of Sections 8(a)(5) and 8(d); and based on said refusal, the Board seeks to compel Burns to adopt, honor and enforce the Wackenhut agreement.

On the basis of the foregoing, it is clear that this Court should affirm the instant court of appeals decision to deny enforcement of the portion of the Board's order that required Burns to adopt, honor and enforce the Wackenhut agreement.**

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*[*T*]*he unfair labor practices under the purview of this bill are strictly limited to those enumerated in section 8.* This is made clear by paragraph 8 of section 2, which provides that 'The term "unfair labor practice" means any unfair labor practice listed in Section 8. . . .'" Senate Report No. 573 On S. 1958, 2 Legis. Hist. NLRA 2300 at 2308. (Emphasis added.)

**Cases upholding the Board's power to order an employer to execute an agreement negotiated on his behalf by an agent, an *alter ego,* or a multi-employer association, are inapposite. See, *e.g., Retail Clerks v. NLRB,* 373 F.2d 655 (D.C. Cir. 1967); *Oilfield Maintenance Co.,* 142 N.L.R.B. 1384 (1963). In these cases, the employer consented to be bound to the agreement, and all that remained was the formal execution of an agreement. The Board's Counsel argues that Burns had knowledge of the Wackenhut agreement when it bid for the Lockheed service contract. (Board Brief, p. 28.) However knowledge of the Wackenhut agreement could only have put Burns on notice that under *Wiley* it might in the future be required to arbitrate grievances arising under the Wackenhut agreement. While Burns accepted this risk, it never consented to be bound by the Wackenhut agreement, and rejected the UPGWA demand that it be bound thereby. Indeed, when Burns first became aware of the Wackenhut agreement, the law as expressed in *Rohlik, Inc.,* 145 N.L.R.B. 1236

B. Wiley Does Not Support a Holding That Burns Violated Sections 8(a)(5) and 8(d) by Refusing to Adopt, Honor and Enforce the Wackenhut Agreement.

Wiley was an action under Section 301 to compel arbitration concerning certain employee rights which had allegedly "vested." It was not an unfair labor practice case involving Sections 8(a)(5) and 8(d). In *Wiley*, the question before the Court relevant hereto was:

> ". . . [W]hether a corporate employer must arbitrate with a union under a bargaining agreement between the union and another corporation which has merged with the employer. . . ." 376 U.S. at 544.*

The Court held that:

> ". . . [T]he disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not

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(1964), clearly was that a successor was not bound, as a matter of law, by its predecessor's collective bargaining agreement. *NLRB v. Strong*, 393 U.S. 357 (1969); *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967); *Smith v. Evening News Ass'n.*, 371 U.S. 195 (1962); and *NLRB v. Huttig Sash & Door Co.*, 377 F.2d 964 (8th Cir. 1967), are inapposite. Such cases involved the Board's power under Section 10 of the Act to remedy a conventional unfair labor practice. *NLRB v. C & C Plywood Corp.*, and *NLRB v. Huttig Sash & Door Co.*, (unilateral changes in wage rates); *NLRB v. Strong* (refusal to execute an agreement negotiated by a multi-employer association in the absence of a timely withdrawal); *Smith v. Evening News Ass'n.*, (discriminatory discharge). In each case there was a valid and binding collective bargaining agreement to which the employer or its authorized agent had agreed. Further, the provision of Section 8(d) which forbids termination or modification of a contract without proper notice is not relevant because the application of this provision presupposes that Burns was bound by the Wackenhut agreement—the very question before this Court.

*The other question before the Court concerned procedural arbitrability.

> automatically terminate all rights of the employees covered by the agreement, and that, *in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.*" (Id. at 548.) (Emphasis added.)

The decision in *Wiley* to require a successor employer to arbitrate under its predecessor's collective bargaining agreement was based entirely upon the policy of utilizing arbitration as the favored means for resolving industrial disputes. This policy lies at the core of the federal law that has been developed by this Court under Section 301. *Wiley* is an integral part of the line of cases decided under Section 301, which evolved from *Textile Workers v. Lincoln Mills, Inc.*, 353 U.S. 448 (1957). In *Textile Workers v. Lincoln Mills Inc.*, the Court noted that Section 301 provided a mandate for the federal courts to fashion a body of common law governing the enforcement of collective bargaining agreements, and held that the agreement to arbitrate contained in a collective bargaining agreement was specifically enforceable in federal courts. Thereafter, the Court, in the Steelworkers Trilogy,* held that disputes involving collective bargaining agreements will be referred to arbitration whenever there is any reasonable basis for so doing. *Wiley* involved the application, to cases involving changes in ownership, of the doctrine requiring the resolution of disputes through arbitration whenever there is a reasonable basis for so doing. Indeed, in *Wiley*, the Court, citing *Steelworkers v. War-*

Steelworkers v. Enterprise Wheel & Car. Corp., 363 U.S. 593 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960).

rior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960), analogized its holding to:

> ". . . [T]he principle that when a contract is scrutinized for evidence of an intention to arbitrate a particular kind of dispute, *national labor policy* requires, within reason, that 'an interpretation that covers the asserted dispute,' . . . be favored." 376 U.S. at 550, n. 4. (Emphasis the Court's.)

The court of appeals below correctly noted that the policy basis upon which *Wiley* was decided made it inapposite to a determination of the issues presented herein under Sections 8(a)(5) and 8(d). (Appendix, pp. 191-192.) However, the Board attempted to utilize the rationale of *Wiley* and the other arbitration cases decided under Section 301 to circumvent the prohibition of Section 8(d) and the legislative history of the Act against ordering a non-consenting party to accept a collective bargaining agreement to which it did not agree. (See pp. 24-32, *supra*.) The Board stated:

> "Nor can a holding that Burns is obligated to honor and adhere to the express terms of the contract readily be equated with compelling Burns to agree to a bargaining proposal or make a concession it is unwilling to make. Indisputably, there is a contract. That contract covers the employees of the employing industry which Burns took over; it was negotiated on behalf of the employing enterprise by Wackenhut, Burns predecessor. *That contract is reasonably related to Burns through its takeover of Wackenhut's Lockheed service functions and its hiring of Wackenhut employees.*" (Appendix p. 10.) (Emphasis added.)

The Board's language was obviously based upon the following statement in *Wiley:*

> ". . . [A]lthough *the duty to arbitrate,* as we have said . . . must be founded on a contract, *the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed.* This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated." 376 U.S. at 550. (Emphasis added.)

It is clear that the cases referred to in *Wiley* as those involving "no contract whatever" or no contract "reasonably related to the party sought to be obligated," were cases arising under Section 301 concerning the duty to arbitrate. The Court clearly was not referring to cases arising under the unfair labor practice portions of the Act where Section 8(d) and clear legislative history against the imposition of collective bargaining agreements applies. Indeed, all of the relevant cases cited by the Court in *Wiley* with respect to the issue of a successor's duty to arbitrate arose under Section 301.*

The Court in *Wiley* referred to unfair labor practice cases involving the duty of a successor employer to bargain with its predecessor's union,** and specifically stated that it:

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*The Court relied on *Textile Workers v. Lincoln Mills, Inc., supra,* and the Steelworkers' Trilogy.

**See 376 U.S. at 551, where the Court cited *NLRB v. McFarland,* 306 F.2d 219 (10th Cir. 1962), *NLRB v. Aluminum Tubular Corp.,* 299 F.2d 595 (2d Cir. 1962), and *Cruse Motors, Inc.,* 105 N.L.R.B. 242 (1953). The Court also cited *L. B. Spear & Co.,* 106 N.L.R.B. 687 (1953), and noted that *Wiley* did not concern the problem where there was more

"[did] not suggest any view of the questions surrounding a certified union's claim to continued representative status following a change in ownership." (376 U.S. at 551.)

Therefore, it is clear that neither the doctrine nor the policy of the unfair labor practice portions of the Act played any part in this Court's decision in *Wiley*. It is significant that the Court in *Wiley*, though urged to hold that a successor employer was bound by its predecessor's entire collective bargaining agreement, refrained from so holding. (See, Brief of American Federation of Labor and Congress of Industrial Organizations as amicus curiae at 8-22, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).)* Since *Wiley* was de-

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than one union. Finally, the Court cited *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962) for the proposition that the union in *Wiley* could represent the employees covered by the agreement out of which the duty to arbitrate arose. The petitioner in *Wiley* had argued that since it was not a party to an agreement to arbitrate, and had not assumed obligations thereunder, it could not be ordered to arbitrate. (376 U.S. at 547; see also, Brief of Petitioner at 23-30, *Wiley*.) The briefs of the petitioner in *Wiley* did not cite either the bar of Section 8(d) or the legislative history against imposing agreements upon nonconsenting parties, or cases decided thereunder, to support its argument on this point. (See Brief and Reply Brief of Petitioner, *Wiley*.)

*In *Wiley*, the AFL-CIO, in its Brief, had argued before this Court as follows:

"We take, first, the simplest case in which the question in this case can arise. Does the mere fact of a change in ownership of a business enterprise terminate a collective bargaining agreement? Management and union have, through the process of bargaining, hammered out a set of rules which will govern employment for, say, 2 years. Shortly thereafter the business is sold—lock, stock and barrel. The new owner takes over everything—the physical plant, the contracts with customers, the trade name, the accounts receivable, the good will. He is carrying on the same business in the same way at the same stand. But, he specifies, he is not assuming the collective bargaining agreement.

(This footnote is continued on next page)

cided pursuant to Section 301 under a broad Congressional mandate to fashion a body of federal common law concerning collective bargaining agreements, if the rule of contract survival sought by the Board herein were proper, the Court would have so ruled in *Wiley*.

In spite of the foregoing, the Board's Counsel argues that inherent in the *Wiley* decision is the proposition that a collective bargaining agreement survives a change in ownership. (Board Brief, p. 25.) The Board and the Board's Counsel have failed to recognize that the Court in *Wiley* left it entirely to the arbitrator to decide all questions regarding contract survival; and that it is for the arbitrator to decide whether all or any part of a collective bargaining agreement applies to a successor employer. Indeed, after the *Wiley* dis-

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"What, under these circumstances, is the status of that agreement? Conventional contract principles would assert that it has terminated, at least insofar as it pertains to the plant that has been sold . . . Of course, if the transfer of ownership is accomplished by sale of the stock of the contracting company—as is often the case—the result would be different . . . .

"It is our view that these results, indicated by conventional contract law, are nonsense in terms of the law to which reference should properly be made—the federal labor law. It is our contention that the collective bargaining agreement should be regarded as continuing to regulate the industrial community for which it was designed so long as that community continues in existence, irrespective of any change in ownership.

"It might, at first glance, appear radical to urge that a purchaser is bound by a collective bargaining agreement to which he never consented. Upon reflection, however, it becomes apparent that a collective bargaining agreement is not a consensual arrangement in the way that other agreements are . . .

"It is, we believe, no more radical to hold that a purchaser of a business is bound by the agreement than it is to hold that subsequently hired employees are bound by it. . . ." (Brief of American Federation of Labor and Congress of Industrial Organizations, as *Amicus Curiae* at 8-10, *John Wiley & Sons, Inc. v. Livingston, supra.*)

pute was referred to arbitration, an arbitrator held that the contract did not survive the merger. See *Interscience Encyclopedia, Inc.*, 55 LA 210 (Roberts, 1970).

The Board has failed to recognize that when a court is functioning under Section 301, there are no statutory limitations on its power such as those contained under Section 8(d) and the legislative history of the Act. To the contrary, under Section 301, courts have a mandate to shape and make the law. The interaction between Section 301 and other portions of the Act was considered by this Court in *NLRB v. Strong*, 393 U.S. 357 (1969), where it was made clear that all of the principles developed under Section 301 are not applicable to unfair labor practice cases. In *Strong*, the employer, who was a member of a multi-employer association and had not withdrawn in a timely fashion, refused to sign the agreement, which contained a provision for binding arbitration, that had been negotiated by the association. The Board ordered the employer to sign the agreement and pay the fringe benefits that were due thereunder. The employer argued that the order to pay fringe benefits was not enforceable because the Board, like a court, was required to defer to arbitration questions of contract application. The employer contended that an arbitrator—and not the Board—must determine whether fringe benefits were owed the employees under the agreement. This Court held that the principles developed under Section 301, requiring a court to defer to arbitration, did not apply to the Board in an unfair labor practice case because of the express powers granted to the Board under Sections 10(a) and 10(c) of the Act. Similarly, in the instant case, the principles developed under Section 301 and enunciated in *Wiley* do not apply to the Board—and

obviously may not be expanded in an unfair labor practice case in view of Section 8(d) and the legislative history of the Act.

On the basis of the foregoing, it is clear that the court of appeals below was correct in rejecting the Board's contention that *Wiley* supported its holding herein.*

C. Imposing a Collective Bargaining Agreement Upon a Non-Consenting Party Will Cause Serious Inequities Upon Employees, Unions and Employers.

Even if it is assumed *arguendo* that Burns was Wackenhut's successor, the court of appeals' decision, together with existing law, has fully effectuated the policies of the Act by requiring Burns to recognize and bargain with UPGWA as the exclusive representative

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*Other courts of appeal have noted that the holding in *Wiley* is limited to requiring a successor employer in an action under Section 301 to arbitrate grievances under its predecessor's agreement. *Bath Iron Works Corp. v. Draftsmen's Ass'n*, 393 F.2d 407, 410 n. 3 (1st Cir. 1968); *Monroe Sander Corp. v. Livingston*, 377 F.2d 6, 11 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967); *Teamsters Local 568 v. Red Ball Motor Freight, Inc.*, 374 F.2d 932, 939-40 (5th Cir. 1967); *McGuire v. Humble Oil & Refining Co.*, 355 F.2d 352 (2d Cir.), *cert. denied*, 384 U.S. 988 (1966); *United Steelworkers v. Reliance Universal Inc.*, 335 F.2d 891, 895 (3d Cir. 1964); *Retail Store Employees Local 954 v. Lanes of Findlay, Inc.*, 260 F.Supp. 655 (N.D. Ohio 1966). *Wackenhut Corp. v. United Plant Guard Workers*, 332 F.2d 954 (9th Cir. 1964) is not contrary. As in the cases cited above, the court in *Wackenhut* specifically held that a successor can be compelled to arbitrate under its predecessor's collective bargaining agreement but in dicta, the court stated that the contract was binding upon the successor. This same dictum appeared in *Teamsters Local 524 v. Billington*, 402 F.2d 510 (9th Cir. 1968), and was followed in *Pulp Workers v. Great Northwest Fibre Co.*, 263 F.Supp. 167 (E.D. Wash. 1965). *Cf. Joint Local Exec. Bd., Hotel Union v. Joden, Inc.*, 262 F.Supp. 390, 396 (D. Mass. 1966), and *In re Bethbowl Corp.*, 283 N.Y.S. 2d 258 (Sup. Ct. 1967).

of Facility guards.* Since the passage of the Act, the preservation and encouragement of collective bargaining and arbitration have been regarded as the most effective means of avoiding industrial strife. However, the Board has now held that these means are inadequate and that the forced imposition of a collective bargaining agreement is needed to preserve industrial peace in cases involving changes in employers. The imposition of a collective bargaining agreement upon a non-consenting party will not insure that there will not be a strike or a lockout. There still could be a strike or a lockout in breach of contract, and judicial remedies therefore have not always been successful. Forcing a collective bargaining agreement upon a non-consenting union or employer could create an unhealthy working environment that would be worse than a strike. Even if imposition of a collective bargaining agreement could prevent resort to economic action, such imposition is in direct violation of the intention of Congress in Section 8(d) of the Act, which clearly permits parties to freely negotiate utilizing whatever economic power they might

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*It is undisputed that a successor employer (a) is obligated to recognize and bargain with the union representing its predecessor's employees (see, *e.g., NLRB v. Auto Ventshade, Inc.*, 276 F.2d 303, 304 (5th Cir. 1960)); (b) must refrain from making unilateral changes in the terms and conditions of employment; (c) must give the union notice of any proposed change in the terms and conditions of employment; and (d) must bargain about such change if requested to do so by the union. (See, *e.g., Overnite Transportation Co.*, 157 N.L.R.B. 1185 (1966)), enforced, 372 F.2d 765 (4th Cir.), cert. denied, 389 U.S. 838 (1967). It has also been established that a successor employer must, under certain circumstances, remedy the unfair labor practices of its predecessor. (See, *e.g., Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942).) Further, under *Wiley*, had UPGWA so requested, Burns would have been required to submit disputes concerning employee rights under the Wackenhut agreement to arbitration.

possess.* While industrial peace might have been preserved in *H. K. Porter* by upholding the Board's order, even though there was a flagrant violation of the Act, the Court refused to force agreement. Without Congressional action repealing Section 8(d) and overruling *H. K. Porter,* the Board's rule of contract survival cannot be enforced.

In *Kota Division of Dura Corp.*, 182 N.L.R.B. No. 51, 74 L.R.R.M. 1104 (1970), the Board held that a union remains bound by a collective bargaining agreement even after a change of employer.** Forcing acceptance of a collective bargaining agreement upon a non-consenting union or employer will foster rather than prevent industrial strife. The court of appeals below recognized that a change of employers may make it inequitable to force a union's continued compliance with a collective bargaining agreement that was negotiated under different circumstances and with a different employer. The court stated:

> "Although it is true that a rule such as that promulgated by the Board would put future po-

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*See *NLRB v. Insurance Agents'*, 361 U.S. 477 (1960). The right of employees to strike and to engage in concerted activities is fully protected by Section 7 of the Act [*NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962)]; as is the right of employers to form multi-employer associations to pool strength and lockout. *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965); *NLRB v. Truck Drivers*, 353 U.S. 87 (1957) (Buffalo Linen case).

**In *Kota Division of Dura Corp.*, the only information the union received regarding the possibility of the sale of the business was a memorandum sent to it by the employer at the time that there were tentative negotiations concerning the sale of the business. Thereafter, the union received notice that the sale had been consummated and that the new owner had assumed all obligations of the predecessor, which included the labor agreement in question. The union then insisted on negotiating a new agreement. (See Trial Examiner's decision in *Kota Division of Dura Corporation, supra.*)

tential successor employers on notice that existing contracts would be obligatory on them and thus provide them with a choice of action, the rule would bind the union to a contract with a successor employer without giving it any opportunity for choice. This could sometimes result in serious inequities. For example, where a union made substantial concessions to a failing employer in order to keep him in business and then discovered that the successor was a strong, financially viable organization, it would have no chance to bargain anew." (Appendix, p. 192.)

Serious inequities upon employers may also be caused under the Board's rule. Where a predecessor's poor business ability or economic position necessitates a transfer, a successor is often motivated by the belief that different policies will yield profitable results. If a successor is bound by the collective bargaining agreement which contributed to the predecessor's economic problems, transfer will be discouraged. The alternative to transfer often is for the predecessor to go out of business, with attendant dislocations of employees and possible industrial strife. See Banta, *Labor Obligations of Successor Employers,* 36 Geo. Wash. L. Rev. 215 (1967). In some cases an acquiring employer or a successful bidder may be motivated to make lawful changes in corporate structure, employee functions, work location, employee environment and the composition of the work force in order to avoid being a successor. See, e.g., *Federal Electric Corp.,* 167 N.L.R.B. 469 (1967); *Apex Record Corp.,* 162 N.L.R.B. 333 (1966). Clearly, a rule which makes the consequences of becoming a successor employer more onerous and encourages drastic changes in the employing

industry will ultimately be contrary to the employee interests which the Board is constituted to protect.

The Board argues that the harmful aspects of its decision may be avoided because in "unusual circumstances," it will not apply the rule of contract survival. The court of appeals rejected this contention, correctly noting that:

> "The Board's holding that it will consider 'unusual circumstances' (see, e.g., *Emerald Maintenance, Inc.*, 188 N.L.R.B. No. 139 (1971) where the Board, citing 'unusual circumstances,' refused to apply the rule it had earlier laid down in *Burns*) is no answer since it merely arrogates to the Board the additional power to pick and choose among the contractual provisions it will impose on non-contracting parties." (Appendix p. 192.)

There are additional reasons to affirm the court of appeals' decision on the contract issue. Burns obtained its Facility subcontract on the basis of competitive bidding. The Wackenhut agreement, which had a three year term, was consummated approximately sixty days before Wackenhut's subcontract with Lockheed was scheduled to expire, and during the time that Lockheed was obtaining competitive bids from other plant protection subcontractors. (See Appendix, pp. 126, 127, 150.) Under almost identical circumstances, the Board has held that its rule of contract survival should not apply. *Emerald Maintenance, Inc.*, 188 N.L.R.B. No. 139, 76 L.R.R.M. 1437 (1970).

In *Emerald Maintenance, Inc., supra*, the United States Air Force awarded Emerald a contract to provide maintenance at Laredo Air Force Base. The contract between the Air Force and Emerald was consum-

mated pursuant to the Service Contract Act of 1965, 41 U.S.C. Sections 351-357, which required that the contract be awarded to the low bidder, on the basis of competitive bidding without negotiations. At the time Emerald bid, the previous contractors' employees were represented by a union and were covered by a collective bargaining agreement which expired six months after the expiration date of the contract between the previous contractor and the Air Force. The collective bargaining agreement contained a substantial increase in employee benefits which was to commence upon the expiration date of the agreement with the Air Force and the previous contractor. Apparently the union and the previous contractor had hoped that the Department of Labor would consider the prospective increases when establishing the prevailing area wage which prospective bidders were expected to pay. If this had occurred the cost of the increased benefits would have been absorbed by the Air Force, and would have been taken into account as a cost item by bidders. However, when the Air Force solicited bids it specified as the prevailing area wage the rates paid under the collective bargaining agreement prior to the effective date of the increases. Emerald, in bidding, did not take the increases into account.

In holding that Emerald was not bound by its predecessor's collective bargaining agreement, the Board stated:

> ". . . [A] mechanistic application of *Burns* under the circumstances here would retard, rather than advance, that goal. These Federal service contracts are not subject to refinement through negotiation. Thus, the contracting parties have no device through which they can by agreement allocate be-

tween themselves the sudden cost changes resulting from changed employment terms. We perceive that Respondent as successful bidder for such a service contract could be expected to have only three options if compelled to abide by its predecessor's contracts: it might abandon the service contracts, forcing the Air Force to perform the services with its own employees; it might refrain, without regard to considerations of lawfulness, from employing the work force of the predecessors, or, it might fulfill its contractual obligations to the Air Force and its predecessors' obligations to the Union, thereby jeopardizing its economic viability and the jobs of its employees. It does not serve the purposes of *Burns* to confront an employer and its employees with such alternatives . . . *This case suggests the hazards of enforcing the contracts of one employer against a successor where annual rebidding normally produces annual changes in contractor identity. These circumstances might encourage less arm's length collective bargaining whenever the employer had reason to expect that it would not be awarded the next succeeding annual service contract.*" (188 N.L.R.B. at ...., 76 L.R.R.M. at 1438-1439.) (Emphasis added.)

Many of the same reasons for not forcing Emerald to accept the agreement apply herein, even though the agreements between Lockheed and Burns, and Lockheed and Wackenhut, were not covered by the Service Contract Act. In *Emerald Maintenance, Inc.*, the Government had made a decision that it did not want to absorb the prospective cost increases provided in the previous contractor's collective bargaining agreement. In the instant case, in all probability, the cost Lock-

heed incurred under the plant protection sub-contract were ultimately paid by the Government. There is no reason to assume that the Government would desire that the increased costs in a collective bargaining agreement between one of its prime-contractors, Lockheed, and a plant protection sub-contractor be applied to a different sub-contractor. Further, even though the sub-contracts between Lockheed and Wackenhut were for terms of one year (Appendix, pp. 128, 129-130), the Wackenhut agreement was for a three year term. As in *Emerald Maintenance, Inc.*, "the hazards of enforcing the contracts of one employer against a successor where annual rebidding normally produces annual changes in contractor identity" are present. Indeed, in the plant protection industry, there are frequent changes of contractors. It is quite possible that Wackenhut, realizing that it could lose its contract with Lockheed, negotiated a three year agreement in order to make it more difficult for other subcontractors to obtain the Facility job from Lockheed. As in *Emerald Maintenance, Inc.*, the rule of contract survival in the instant case will tend to discourage arms length bargaining.

As has been noted above, the Board's reliance on *Wiley* was incorrect. Indeed, rather than supporting the Board's position, *Wiley* supports the contentions herein. In *Wiley*, the Court reaffirmed its faith in the arbitral process and in an arbitrator's ability to resolve industrial relations problems created at the time of a change in ownership of an enterprise. (See 376 U.S. at 551, n. 5; see also *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960). As the Steelworkers' Trilogy indicates,

courts are bound to defer to arbitration whenever arbitration has been provided in the agreement. It is submitted that this policy also applies to the Board, insofar as requiring that all questions concerning the survival of a collective bargaining agreement after a change of employers must be resolved by arbitration.*

In *Wiley*, the Court said:

> "The preference of national labor policy for arbitration as a substitute for tests of strength between contending forces could be overcome only if other considerations compellingly so demanded." (376 U.S. at 549-550.)

There are no countervailing considerations in the instant case which overcome the preference of national labor policy for arbitration. Indeed, in the instant case there are compelling considerations which favor requiring arbitration rather than imposing a contract upon a non-consenting party.

In *Collyer Insulated Wire*, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971), an employer was charged with violating Sections 8(a)(1) and (5) of the Act by making unilateral changes in wages and other terms and conditions of employment. The employer argued that the changes made were authorized by its collective bargaining agreement. The employer urged that the dispute should be resolved by an arbitrator, under the grievance and arbitration provisions of the agreement, and not by the Board. The Board, by a three to two margin, decided, as a matter of policy, to dismiss the unfair labor practice complaint so that the dispute could

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*See *NLRB v. Strong*, 393 U.S. 357 (1969). (Douglas, J., dissenting opinion).

be resolved through the grievance and arbitration provisions of the collective bargaining agreement.*

The Board in *Collyer Insulated Wire* noted that it was not required as a matter of law to defer to arbitration.** However, citing *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964), the Board found that deferral would best serve the purposes of the Act because:

> "In our view, disputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute. The necessity for such special skill and expertise is apparent upon examination of the issues arsing from Respondent's actions with respect to the operators' rates, the skill factor increase, and the reassignment of duties relating to the worm gear removal. Those issues include, specifically: (a) the extent to which these actions were intended to be reserved to the management, subject to later adjustment by grievance and arbitration; (b) the extent to which the skill factor increase should properly be construed, under article IX of the agreement, as a 'change in the general scale of pay' or, conversely, as 'adjustments in individual rates . . . to remove inequalities or

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*The Board's majority consisted of Chairman Miller, and Members Kennedy and Brown. Member Brown wrote a separate concurring opinion. Board Members Jenkins and Fanning wrote separate dissenting opinions.

**In contrast to *Collyer Insulated Wire*, the instant case falls under the policy of Section 8(d) which prohibits the Board from ordering Burns to accept the Wackenhut agreement.

for other proper reason'; (c) the extent, if any, to which the procedures of article XIII governing new or changed jobs and job rates should have been made applicable to the skill factor increase here . . . The determination of these issues, we think, is best left to discussions in the grievance procedure by the parties . . . or, if such discussions do not resolve them, then to an arbitrator chosen under the agreement and authorized by it to resolve such issues."

The Board's recognition in *Collyer* that it has no specific expertise in the application and interpretation of collective bargaining agreements is significant.* Congress did not intend to confer jurisdiction on the Board to enforce collective bargaining agreements. Instead, it intended that actions concerning collective bargaining agreements be handled according to the usual processes of law, i.e., arbitration or suits under Section 301. The complex contractural problems caused by changes of ownership call for the expertise, speed and flexibility of arbitration. See, generally, Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems,* 57 Colum. L. Rev. 52 (1957). An arbitrator is particularly well suited to consider whether the collective bargaining agreement and practice thereunder

*In *Sinclair Refining Co. v. NLRB,* 306 F.2d 569, 577 (5th Cir. 1962), the court stated: "While Congress has, of course, presumably infused an expertise in the members of the Labor Board with respect to matters committed to its jurisdiction, Garner v. Teamsters, Chauffers and Helpers Local Union, 1953, 346 U.S. 485, 490 . . . it has 'expressly rejected that policy with respect to violations of collective bargaining agreements * * *.' Charles Dowd Box Co., Inc. v. Courtney, 1962, 368 U.S. 502. . . . Those controversies are left 'to the usual processes of the law.' The processes of the law are, of course, either traditional court action or the grievance machinery where established."

of one employer should be applied to another. The court in *Steelworkers v. Reliance Universal, Inc.*, 335 F.2d 891, 895 (3d Cir. 1964), aptly noted:

> ". . . [*N*]*ew circumstances created by the acquisition of a business by a new owner may make it unreasonable or inequitable to require labor or management to adhere to particular terms of a collective bargaining agreement previously negotiated by a different party in different circumstances.* Although the pre-existing labor contract indicates the structure of labor relations and the established practice of the shop at the beginning of the new proprietorship, an arbitrator of a subsequent complaint charging unwarranted departure from that scheme may properly consider any relevant new circumstances arising out of the change of ownership, as well as the provisions of and practices under the old contract, in achieving a just and equitable settlement of the grievance at hand." (Emphasis added.)

The harmful effects of the Board's rule are easily avoided by enforcing only the legal obligations which obtained as to successors, both employers and unions, prior to the rule announced by the Board in the instant case. The parties would thereby be free to negotiate for any protection either deems appropriate—and resolve any problems through the process of collective bargaining, including arbitration where there is an agreement containing an arbitration clause.

On the basis of the foregoing, it is clear that the court of appeals refusal to enforce that portion of the Board's order which requires Burns to adopt, honor and enforce the Wachkenhut agreement fully comports with the Act.

Conclusion.

This Court should reverse that portion of the court of appeals' judgment ordering Burns to recognize and bargain with UPGWA as the exclusive representative of Burns Facility guards. However, if the Court affirms such part of the court of appeals' judgment, it should also affirm that portion of the court of appeals' judgment wherein it refused to enforce the Board's order that Burns adopt, honor and enforce the Wackenhut agreement.

Respectfully submitted,

CHARLES G. BAKALY, JR.,
SEYMOUR SWERDLOW,
Attorneys for Burns International Security Services, Inc.

Of Counsel:
O'MELVENY & MYERS,
KATHLEEN PERATIS.

Dated: December 30, 1971.

APPENDIX A.

[Tr. p. 1.]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Thirty-First Region

Case No. 31-CA-776

In The Matter of
The William J. Burns International Detective Agency, Inc., Respondent
and
International Union, United Plant Guard Workers of America and Its Amalgamated Local Union No. 162, Charging Party,
and
American Federation of Guards, Local 1, Party in Interest

Hearing Room #1
215 West Seventh St., 9th Floor,
Los Angeles, California
December 19, 1967

The above-entitled matter came on for hearing, pursuant to notice, at 10:30 o'clock, a.m.

BEFORE: E. Don Wilson, Esq., Trial Examiner.

APPEARANCES:

Gerald Goldman, Esq., Clifford L. Hardy, Esq., 215 West 7th St., Los Angeles, California, appearing on behalf of the General Counsel.

Livingston, Gregory, Van Lopik & Higle, By: Gordon A. Gregory, Esq., 2140-2144 First National Bldg., Detroit, Michigan, appearing on behalf of the Charging Party.

O'Melveny & Myers, By: Charles G. Bakaly, Jr., Esq., and Seymour Swerdlow, Esq., 433 S. Spring Street, Los Angeles, California, appearing on behalf of the Respondent.

[Tr. p. 3] PROCEEDINGS

[Tr. p. 108.] ARTHUR C. POTTER

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Swerdlow) Would you please state your name and address.

A. Arthur C. Potter, 1880 Los Robles, San Marino.

Q. Mr. Potter, could you state who your employer is?

A. I am Director of West Coast Operations and Area Manager for Los Angeles for the Wackenhut Corporation.

Q. Are you familiar with the operations of the Wackenhut Company in the Los Angeles and let's say Southern California area?

A. I am.

Q. Are you familiar with those operations as they were in 1967 prior to June 1?

A. Yes, sir, I am.

[Tr. p. 109.]

Q. Now, approximately how many employees did Wackenhut Company—well, before we get into that, you were in your present job when the United Plant Guard Workers Union got the union organized and campaigned at Lockheed?

A. Yes, sir.

Q. And you are familiar with the operations of Wackenhut Company as they were in Southern California at that time?

A. I am.

Q. Now, the questions that I am going to ask you, relate to the time that the union petitioned for election, the early part of 1967—

[Tr. p. 110.]

MR. GREGORY: May I make the further objection, the evidence appears to be irrelevant and immaterial, that is as to the Wackenhut operation in the West Coast and specifically, Lockheed, we have already stipulated that.

TRIAL EXAMINER: That seems to me to be pretty much correct. But we have a situation here where we have got a certified unit as recognized for Lockheed employees as plant guards. You don't dispute that was the appropriate unit so far as Wackenhut was concerned?

MR. SWERDLOW: Well, that's just what I am going to dispute, and the reason I think I have the right to dispute it is because, that was the appropriateness of that unit is very relevant to this proceeding, if that was not an appropriate unit, certification was improper and UPGW would have no bargaining right. Now, Burns was not a party to certification, and it is entirely erroneous to find we are bound by proceedings we were not a party to, and our rights depend on it, and this is especially so when there was never any hearing on this.

[Tr. p. 113.]

Q. Can you tell me briefly what the organizational structure of the Wackenhut Company is, how you fit into it as the Director of West Coast Operations, who you report to, who they report to, how the division of the company is set up? Basically, I would like the kind of information that would appear in an organization chart.

A. The company is headed up by George Wackenhut as President, Corporate Headquarters at Coral Gables, Florida; Chief Vice-President John Ammerill; Vice-President in Charge of Operations; Vice-President in Charge of Development, and other corporate offices are all located at Coral Gables, [Tr. p. 114] Florida. Would you like me to name the others?

Q. No.

A. We have offices in various principal cities in the United States and including South America. I was designated Director of West Coast Operations sometime in June, 1966, and requested by Mr. Wackenhut to take charge of the operations in Los Angeles, given the position of Area Manager for Los Angeles Office.

Q. What territory was in your jurisdiction?

[Tr. p. 115.]

Q. (By Mr. Swerdlow) What about the State of California, is your jurisdiction over all jobs?

A. With the exception of Livermore, I am.

Q. I am talking about the time of certification; you are talking about February and March, 1967, at that time; all my questions are going to be related to that period, not your present operation. At that time, your office had jurisdiction over all the jobs in California?

A. All with the exception of one supervised out of our corporate headquarters.

Q. That's at Coral Gables?

A. That job was not in this area, but in the State of California.

Q. Does your office handle any jobs, states bordering in California?

A. Not if you are speaking of guard operations. I might supervise and occasionally investigate in some other state, not on guard jobs.

Q. All the guard operations are in California. Now, how many different jobs does Wackenhut Company have in the State of California that were under your jurisdiction at that time?

A. I couldn't say off hand; there are several hundred of them. I would have to look at the records.

[Tr. p. 117.]

Q. (By Mr. Swerdlow) I would like, to the best that you [Tr. p. 118] can give us, an estimate of the number of guard jobs that Wackenhut had at the time we are concerned with here, regardless of the number of guards on the job, and excluding investigations, investigating kind of jobs?

MR. GOLDMAN: I object. I think that's ambiguous. He is not defining the territory.

TRIAL EXAMINER: He is talking about the area under this witness' jurisdiction.

THE WITNESS: It would be a very rough estimate.

TRIAL EXAMINER: Well, give us a rough estimate.

THE WITNESS: I could only say two or three hundred.

Q. (By Mr. Swerdlow) All those jobs were supervised out of your office, the overall top level supervision?

A. Yes.

[Tr. p. 119.]

Q. Let's start with your office; who do you report to?

A. As far as operations are concerned, I report to the Vice-President in Charge of Operations in Coral Gables, Florida.

Q. Is this equivalent to midwest or southern director?

A. No, there is no other field operation, say title of Director, Midwest, and so forth, no, sir.

Q. You are the only one who has that title?

A. Yes, sir.

Q. You report to the Vice-President of Operations?

A. Vice-President in Charge of Operations, insofar as operations are concerned, yes, sir.

Q. Who else do you report to?

A. Might report directly to George Wackenhut or John Ammerill, the executive vice-president, on certain matters.

Q. Could you describe what your duties are?

A. General operational head for all matters concerning the Wackenhut Corporation in this area. As administrative head, in other words.

[Tr. p. 120.]

Q. How are wages, fringe benefits, determined for employees in the California area?

A. Those wages are set and approved by our corporate office in Coral Gables.

Q. Is it the same for all employees in the California area?

A. Yes, I might recommend subject to approval of the corporate office.

Q. This would include all employees?

A. Yes, sir.

Q. What about fringe benefits?

A. The same would apply, generally speaking.

Q. What I mean by fringe benefits, holidays?

A. Yes.

Q. Vacations, things of that nature; is that the same as wages?

A. Generally speaking, yes. I say generally speaking because, of course, we have our conferences and agreements and negotiations with our client and our final agreement and our final contract subject to approval by corporate headquarters at Coral Gables.

Q. I see, and before it's approved, you have to approve it?

A. Yes, sir.

Q. Now, where is the permanent records kept for employees in this state-wide, in the State of California?

A. 618 South Serrano Avenue, Los Angeles.

[Tr. p. 121.]

Q. Where are all payroll records kept?

A. Coral Gables, Florida.

Q. Now, do you have any employee manuals?

A. Yes, sir.

Q. Where was that manual prepared?

A. It was prepared—there are several manuals; they were all prepared basically at our corporate headquarters.

Q. I am only talking about guards, guard services?

A. Guard Manual, that was prepared at Coral Gables, Florida.

Q. Now, and all the questions I have asked, now, on fringe benefits, and so forth, relate only to guards in the State of California; when you answered, you understood that?

A. Yes, sir.

Q. Now, this employee manual, how is it used?

A. Well, it's given to each guard that is hired. He studies the manual and is given an examination on it.

Q. What sort of things are covered in the manual?

A. Duties of a guard, basic duties, general orders, you might say, special orders that might apply to a particular job.

Q. And do you have copies of that manual in your office?

A. Yes, sir.

Q. Now, the employees in California get the same or different manuals than employees in other states?

A. As far as their general manual is concerned, they get [Tr. p. 122] the same one.

Q. In the State of California, between the various jobs, the employees in one job get a different manual than employees in another job, in the guard job?

A. Not the guard manual, no.

Q. Now, on your jobs, how are they supervised—well, let me ask a different question: Underneath you is who?

A. As far as the guard operation is concerned, the next man is a manager of physical security.

Q. And what is there, only one manager of physical security?

A. Yes.

Q. And what is his jurisdiction?

A. The same as mine.

Q. Territorial, job-wise?

A. Yes. Los Angeles Office.

Q. What is his title?

A. Manager Physical Security.

[Tr. p. 123.]

Q. (By Mr. Swerdlow) You just told us that the man directly under you was manager of physical security?

A. Yes, sir.

Q. And his jurisdiction is the same as yours, area-wise and job-wise?

A. Generally speaking.

Q. And what are his duties?

A. He directly supervises the area supervisors and the facility supervisors of the various functions in the area.

[Tr. p. 128.]

Q. What is the line of supervision directly below him [the manager of physical security]?

A. Below him, you have a coordinator, scheduler, area supervisors and facility supervisors.

Q. Are they all in the Los Angeles office?

A. Not necessarily. They may occasionally come into the Los Angeles office, but from the standpoint of economy and overall operation, no.

Q. Now, you mentioned coordinator, area supervisor, and—

[Tr. p. 129.]

A. And facility supervisor.

Q. So that's the line of supervision directly below him?

A. Yes, sir.

Q. These three groups?

A. Yes, sir.

Q. Now, the coordinator, is that one person?

A. I believe that's true, possibly now could be classified as coordinator.

Q. How many area supervisors?

A. Eight, I believe.

Q. And how many facility supervisors?

A. It depends on the size of the facility whether any assigned to it or not.

Q. They are out in the field?

A. He is on a particular contract or job working in one particular plant. On the facility job.

Q. O.K. Now, first, where does the coordinator work?

A. The coordinator is in our headquarters building.

Q. Both of them are?

A. There is one at this time working down in our other, 6900 Hoover, our other building.

Q. You understand we are talking about the time of the election?

A. Well, you better cut that back to one coordinator, I think, at that time, and he was working out of Serrano Street [Tr. p. 130] address.

Q. Now, you may have forgotten, with respect to some of the questions we were talking about that period?

A. I think this is the only time I varied there, and this is the reason I have to be so indefinite as to the number of guard jobs that were in operation because the number of guard jobs varies from day to day.

Q. O.K. At the time this election proceeding was in progress, you had one coordinator who worked out of the L.A. office?

A. Yes, sir.

Q. What were his duties?

A. The area supervisors are not in the headquarters office very often; they are out covering that area. And the manager of physical security is also out of the office. So, the coordinator is there to coordinate the hiring of the personnel, payrolls, and other miscellaneous duties that affect the various areas.

Q. All the payroll checks are made out in Los Angeles office?

A. We make up the payroll, not necessarily all of them, no.

Q. The ones in Los Angeles?

A. No, they may be out in the facilities.

Q. Where are the checks issued from?

A. Corporate headquarters at Coral Gables, Florida.

[Tr. p. 131.]

Q. Now, with respect to some, the coordinator makes up the payroll?

A. No, not necessarily. He assists the area supervisors, in checking.

Q. All payrolls are turned over to him, is that the way it works?

A. Sometimes after the fact.

Q. After they are prepared?

A. In other words, it may not be practical, perhaps a payroll in Martinez, California, and sent it to Los Angeles, but he would get a copy following the preparation.

Q. They would send it directly to Coral Gables, also?

A. Yes, sir.

Q. But the payroll records and personnel records are in Los Angeles, is that right?

A. Yes, sir.

Q. Now, I am not really clear, when you say coordinate hiring and payrolls and things like that, are the actual—

A. He could have the title of supervisor but this distinguishes him from area supervisor; we call him coordinator.

Q. He is supervising the area supervisors?

A. To coordinate the activities of the area supervisors.

Q. And is he assigned the area supervision, does he assign the area supervisors jobs that they are supposed to work on?

[Tr. p. 132.]

A. No, the geographical covering of the area supervisors is set by the manager of physical security who himself gives these area supervisors their instructions as to what jobs they have to particularly stress and given most attention to, and so forth.

Q. And the coordinator, is his job keeping track of where an area supervisor is on different days?

A. Gives them assistance where needed, hiring men and training men, placing them on particular spots.

Q. Meaning guards?

A. Yes, sir.

Q. What do the area supervisors do?

A. Supervise the jobs and men in their particular area.

Q. Now, let me get back to the coordinator for one minute; is he in a policy making role?

A. No.

Q. Area supervisors; you had eight of them at the time of the election; what are their functions?

A. To supervise the guard jobs in the particular area.

Q. About how many jobs does each area supervisor supervise?

A. That varies a great deal depending upon the geographical covering of this area and the number of guard jobs in the area. He may have only four guard jobs in the area; he may have a dozen.

Q. And if he has four guard jobs, how does he divide his [Tr. p. 133] time?

A. Divides his time up wherever is most appropriate. Some jobs require a lot of his attention; some require very little.

Q. When you say he supervises the jobs, what does he actually do with regard to them?

A. He has to see positions covered on all three shifts, and if a man fails to show up because of illness or for any other reason, he gets hold of another man, gets him in there to cover that spot, sees that we fulfill our contract in that particular area.

Q. He checks to see if the company policy is being enforced?

A. Yes, sir, that is part of his responsibility.

Q. Now, these eight, they cover the California area?

A. Yes.

Q. About how many facility supervisors did you have at the time?

A. I wouldn't even approximate. It would generally fall into a definition category, as to what is a facility supervisor, generally only on larger jobs, might be on some other jobs, might be at the request of the client a lead guard or what-have-you. So, my guess, any guess I made would be a guess, not a statement, it would be very rough, I am afraid not more than one-quarter of our jobs, if that high, is facility supervised. I may be way high.

[Tr. p. 134.]

Q. Facility supervisor is the lowest level supervisor that the company, has, is that right?

A. Depends on the definition of a supervisor; the lowest level that we would, company wise, give him.

Q. The title of supervisor?

A. Yes. He may have the title of Sergeant, Captain, Lieutenant.

Q. Are there people below him who have the power to hire, fire?

A. No, a facility supervisor may not have the power to hire or fire, depending on the particular authority given him.

Q. What about the authority to make effective recommendations with regard to hiring and firing or other disciplinary matters?

A. I would say he would be most likely to have the authority to hire, most facility supervisors would have that responsibility, but he may not have the responsibility to fire. We want to hold that authority to the area supervisor.

Q. The facility supervisor is the lowest supervisor, speaking of authority to hire and fire, the facility supervisor is the lowest supervision of the company?

A. Yes.

Q. Now, with the area supervisors, do they hire employees, interview them and process?

[Tr. p. 135.]

A. Generally speaking, yes.

Q. That's what they do, do they discharge employees, fire them?

A. Yes, area supervisor may very well discharge or fire an employee.

Q. And with respect to all of the jobs under your jurisdiction, they do this, the area supervisors?

A. Yes, there may be an occasional exception where the facility would.

Q. He will delegate that?

A. Yes.

Q. Would that be frequent?

A. Rare.

[Tr. p. 137.]

Q. What type of job has the facility supervisors?

A. The larger jobs, generally speaking.

Q. How many employees constitute a larger job, over 40 or?

A. Not necessarily. It might be 20 or 25; it might be 40 or 45.

Q. What's the low mark?

A. I couldn't say there was a low mark because the particular client might want a facility supervisor, and we might recommend one because of the fact his operation is so small, he should have someone there on the job all the time to closely supervise the operation.

Q. Now, in regard to guards, do you interchange guards? [Tr. p 138.] I am talking about, again, everything I have been asking about relates to the time of this election?

A. There are some areas where you interchange quite a bit, and other areas very, very seldom.

Q. Let's take the Los Angeles County area?

A. I am speaking of the Los Angeles County area, I am saying within the Los Angeles County area, there are various areas where we interchange quite a bit and others where we don't because of geographic and clearance problems and other problems, and because of the fact that problems of working conditions and pay rates are such that we can't interchange, or because it wouldn't be economically feasible We may have a job setting so far from another job that it's not feasible to interchange.

[Tr. p. 144.]

Q. (By Mr. Swerdlow) Mr. Potter, is this the cover and the table of contents of the Wackenhut Guard Manual?

A. It is.

Q. And this is the manual that we discussed, that we have under consideration now?

A. Yes.

Q. And in the manual there are more detailed descriptions related to the matters covered in the table of contents?

A. Yes, sir.

Q. And all Wackenhut Guards are expected to follow the procedures related to these matters?

A. I would have no knowledge of whether all Wackenhut Guards are furnished exactly the same manual.

Q. Well, I am talking about your area?

A. In my area, California, and there is an exception in California, as I mentioned earlier, I have no specific knowledge of, and that is the job at Livermore, California.

Q. Other than the job at Livermore, California, all the other jobs, the manual is given to the guards and they are expected to follow it?

A. Yes, sir.

MR. SWERDLOW: May I offer this as Respondent's Exhibit No. 1. This is the only copy that I have.

TRIAL EXAMINER: You will have to duplicate it.

MR. SWERDLOW: O.K. Can I offer it?

[Tr p. 145.]

TRIAL EXAMINER: Of course you can. I'll give you time to have it duplicated.

Any objections to receipt of Respondent's Exhibit No. 1 for identification in evidence?

MR. GOLDMAN: No objection.

MR. GREGORY: No objection.

TRIAL EXAMINER: Without objection, it is received in evidence.

(The documents referred to were marked Respondent's Exhibit No. 1 for identification and received in evidence.)

Q. (By Mr. Swerdlow) Mr. Potter, when we left off yesterday, we were on the subject of interchange of guards among the jobs in California, and, again, we are talking about the time of the certification. Now, is this a practice in California to transfer guards from one job to another?

A. It's not a practice, if you mean by that a general practice. It is something you desire to avoid in the interest of economy and good management. There is some interchange necessary to take care of illnesses and other matters, resignations, normal turnover problems cause a certain amount of it.

Q. And what percentage of the employees would you estimate worked on more than one job the year immediately preceding [Tr. p. 146] certification?

A. Again I couldn't give any more than a very rough estimate that wouldn't qualify as an estimate but would be a guess. It would be a comparatively small percentage of the total, I would imagine.

TRIAL EXAMINER: Less than 1%?

THE WITNESS: I would say approximately 1% as an educated guess.

Q. Only 1% of the guards worked on more than one job in the last year in California?

A. To the best of my knowledge and belief.

Q. Now, when you get a new job, how do you staff that?

A. It is staffed, if possible, by selecting one or more men who are trained and experienced in our particular method of operation, new men are hired with appropriate background that live and reside in that particular area.

Q. When you select the men that are already trained in your operation, they are already employed by Wackenhut?

A. Generally speaking, yes.

Q. You transfer them to the new job to start the initial crew, is that right?

A. In some instances, yes; not in every instance.

Q. It would be in most instances?

A. I wouldn't know.

Q. Who would be the person who would know that?

[Tr. p. 147.]

A. I don't know whether my manager of security would be able to answer that question more specifically than I can or not. Possibly he could. He may not have it within his personal knowledge, either. He might have to do some research before he could answer that question.

Q. Would there be someone below the manager of security who would know?

A. No, sir.

Q. This information is in the company records?

A. It should be available, yes.

Q. When did Wackenhut first get the Lockheed job?

A. The Lockheed job was one of the jobs already in existence when the Wackenhut Corporation purchased the General Plant Protection Company in 1962. [Tr. p. 152.]

Q. How often do you have meetings with the areas supervisors?

A. No set schedule, possibly once a month.

Q. Where would the meetings take place?

A. Generally held in our headquarters office at 618 South Serrano, all areas supervised, may not include those areas located some distance away.

Q. What about facility supervisors, would they attend these meetings?

A. Generally speaking, no.

Q. Do you have separate meetings for facility supervisors?

A. I wouldn't say we do.

[Tr. p. 153.]

Q. What is the subject that you discuss in the meetings of the area supervisors, the broad general category?

A. The various problems that arise in connection with their job, problems that arise in connection with the training and the training of men, proper preparation of payrolls, various operational problems in connection with the job these men are carrying out.

Q. And I gather you are generally in attendance at these meetings?

A. No, I am not.

Q. Who generally conducts these meetings?

A. The manager of physical security.

Q. Now let's talk about the Lockheed job again. How many employees of Wackenhut have hired on at Lockheed again, talking about the period just at the time of the election?

A. There was fluctuation on this job as in any other job because of our need to have men on stand-by and part-time basis to fulfill the requirements of Lockheed Aircraft Service.

Q. What's the range that you fluctuate?

A. I would say somewhere in the neighborhood of 42 men and the supervisors.

Q. And supervisors?

A. 43 including the supervisors.

Q. One supervisor and 42 guards; I am not trying to confuse, I just didn't understand.

[Tr. p. 154.]

There was a supervisor on the Lockheed job?

A. Yes.

Q. I see, and who was that supervisor?

MR. McCANDLESS: Object to that; I don't think that's relevant.

TRIAL EXAMINER: Overruled.

THE WITNESS: Russell Frazier.

Q. (By Mr. Swerdlow) And when Wackenhut ceased to perform guard services at that facility, Lockheed facility, did Frazier remain as a Burns' employee?

A. No, he did not.

Q. Now, were there sergeants below Frazier on the job?

A. Yes, sir.

Q. And did they vote in the election that took place that the Board conducted in February?

A. I don't know who voted in the election.

Q. Now, the employees at Lockheed, now, were any of them transferred from other jobs Wackenhut had?

A. Some of them may have been. I cite as an example, that in view of the security clearance require-

ment, a man could not always be put immediately on that job until his clearance came through. Generally, that man would be assigned to a facility no longer in operation by Wackenhut Corporation—moved to another area, that was immediately west of Lockheed—and would be placed in that particular position not requiring [Tr. p. 155] clearance temporarily until his clearance came through, and then assigned to Lockheed facility.

Q. How many people were assigned in that manner in the year that immediately preceded the election?

A. I have no idea.

Q. Who would have that information?

A. That would be in our company's record.

Q. Now, Captain Frazier was at the job for the entire year preceding the election?

A. Yes, sir.

Q. Did he work for General Plant Protection before Wackenhut?

A. Yes, he did.

Q. Were any people transferred from the Lockheed job the year immediately preceding the election to other Wackenhut jobs?

A. Were any other people transferred from Lockheed jobs to other jobs?

Q. Were any guards transferred from Lockheed job to another job that Wackenhut has?

A. Not to my knowledge.

Q. And would the company records, or would this be the kind of matter that you would have personal knowledge of?

A. No, not necessarily because we have many jobs.

Q. The company records would indicate the number transferred [Tr. p. 156] in and out?

A. Searching of payroll records, I imagine this information could be determined.

Q. Now, Captain Frazier did have authority to hire employees?

A. Yes, within the restrictions I have previously mentioned in testimony.

Q. Now, did Captain Frazier have authority to discharge employees?

A. Yes, he did.

Q. And would his action be subject to approval of anybody in the company?

A. Certainly, it would be subject to the approval of the manager of physical security and my approval.

Q. Would he take the action before getting this approval or take the action and then get approval afterward; if that's not the way it works, how did it work?

A. I couldn't answer that because I don't recall if anyone was discharged by Captain Frazier.

Q. Was anybody disciplined?

A. Yes, I can state to my own knowledge there were disciplinary measures taken of the guards during that period of time, yes, sir.

Q. Did Captain Frazier get approval before taking those actions?

A. Yes, sir, he filed a report.

[Tr. p. 157.]

Q. And then after the report was approved, he would take the action that he wanted to?

A. He would take the action that he was instructed to take.

Q. Now, where do the employees get their uniforms from?

A. Well, speaking of all of our employees in the State of California, they get them from various locations, depending on the location where they are assigned.

Q. Where would Lockheed get them?

A. They would come into headquarters.

Q. Where is the payroll for Lockheed job kept?

MR. GREGORY: Objection, repetitive.

TRIAL EXAMINER: I don't recall it. Overruled.

THE WITNESS: The payroll records of the company are kept in Coral Gables, Florida. The payroll is, of course, made up locally.

Q. (By Mr. Swerdlow) Where was the Lockheed payroll made up?

A. The Lockheed payroll form as such was made up by the supervisors and any record, any copies of that are kept in our headquarters office in Los Angeles.

Q. The supervisor being Captain Frazier at that time?

A. Not kept in his post office, but in the office on Serrano Avenue.

Q. Now, who was the area supervisor, who supervised the Lockheed job?

[Tr. p. 158.]

A. Captain Frazier.

Q. He was the area supervisor?

A. As well as the facility supervisor.

Q. Did he have any other jobs in that area?

A. What area?

Q. Whatever area he supervised.

A. He had none in Ontario, but in fact he did have that job I mentioned a few moments ago that was terminated several months ago—which I assume

was in Ontario because it was adjacent to the airport. His other jobs were located in other cities such as Pomona, Riverside, temporary job in San Bernardino, and again the jobs fluctuate, too.

Q. Approximately how many other jobs did he supervise, on the average? I understand it fluctuates—or can you give me the range of the fluctuation?

A. Geographical range?

Q. No, number range.

A. Approximately six jobs.

Q. How did he divide his time among the six jobs?

A. He devoted practically full time to the Lockheed job and comparatively little time to the other jobs, unless his particular duties required him to. His duties required him to be at Lockheed plant during his working hours.

Q. His office was at Lockheed plant?

A. Lockheed furnished him with an office.

[Tr. p. 159.]

Q. How would you estimate the percentage of time spent on matters related to Lockheed operation and the percentage of time related to the other operations?

A. I would assume that he probably averaged 60 hours a week and 40 of those were devoted to the Lockheed operation.

Q. You mentioned clearances that were needed for Lockheed job; through what offices were clearances obtained?

A. These were clearances with the United States Government.

[Tr. p. 160.]

Q. Now, where were the employees supplies kept? You already testified about uniforms, but they had

other supplies like billy clubs, weapons, pads of paper; where was that furnished from?

A. Would be furnished to them by Captain Frazier.

Q. Where would he get them?

A. He would, in turn, secure necessary supplies from our office in Los Angeles.

Q. Now, what about vehicles, did you have any vehicles on the Wackenhut job?

A. There was one vehicle at Lockheed.

Q. Where was that supplied from:

A. I can only presume it was supplied from headquarters; it was on that particular job when I arrived in this area.

[Tr. p. 161.]

Q. (By Mr. Swerdlow) When the contract with Lockheed terminated, what happened to the Wackenhut employees; you already testified Captain Frazier remained as a Wackenhut employee?

A. The other employees were terminated.

Q. All of them?

A. Yes, sir.

Q. Are there any of them now working for Wackenhut on other jobs?

A. Not to my knowledge.

Q. Does Wackenhut have any contracts with labor unions in your area, other than the one with United Plant Guard Workers?

A. Any other union?

Q. Or contract in this area?

A. I still need clarification. Any other union?

TRIAL EXAMINER: Any other contract with either United or any other labor organization?

THE WITNESS: Yes, sir.

[Tr. p. 162.]

Q. (By Mr. Swerdlow) In this area, your area?

A. California, yes, sir.

Q. How many? How many other contracts are there?

A. Only one of which I have knowledge. There may be another one which I have no knowledge.

Q. Where would that be?

A. Martinez area.

Q. Now, you have a branch in Santa Ana?

A. Yes, sir.

Q. What is the function at that branch?

A. An office which has an area supervisor and branch manager assigned to handle the operations, guard and other operations in Orange County.

Q. And the branch manager, is he the equal of the manager of physical security?

A. No, he is not.

Q. He reports to the manager of physical security?

A. Insofar as physical security matters are concerned.

Q. And the area supervisor, does he have the same duties as the other area supervisors?

A. His duties differ to the extent he is under a branch manager while the other area supervisors are not.

Q. Who are the others under?

A. The other area supervisors report to, directly to the manager of physical security.

[Tr. p. 163.] CROSS EXAMINATION

[Tr. p. 165.]

Q. (By Mr. Goldman) Of all these, approximately 36 jobs, that you had in and around, let's see, L. A. Metropolitan Area, including Riverside, Orange Coun-

ty, L. A. County, and [Tr. p. 166]San Bernardino County, how many of these jobs involved government security clearances?

A. I couldn't answer that question off hand, sir.

Q. Could you give us an approximation?

A. Would you restate the question?

Q. In Riverside County, one job you had in Riverside County, did that require government security clearance?

A. I don't believe so, to the best of my recollection.

Q. The ten operations that you had in Orange County, did any of them require government security clearance?

A. Yes, sir.

Q. Approximately how many of them?

A. Approximately four. Again, these figures must be approximate.

Q. Is this the same type of government security clearance as involved in Lockheed?

A. No, there are classifications of government security.

Q. Isn't that true that Lockheed Aircraft has top secret clearance?

A. It did have.

Q. At the time you were there?

A. Yes.

Q. Is this the highest possible clearance you can possibly get from the governmental agency?

A. From that particular governmental agency, it's the [Tr. p. 167] highest, as I understand it.

[Tr. p. 170.]

Q. What is the function of the personnel supervisor?

A. It is his responsibility to maintain the personnel records, to see that investigations are conducted on personnel hired; that he happens also to handle industrial relations, matters under my supervision within our organization here, and security clearances, security officer for this area.

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NATIONAL LABOR RELATIONS BOARD, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE AMICUS CURIAE*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and in-

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* This brief is filed with the written consent of both parties pursuant to Supreme Court Rule 42 (2).

dividuals. It is the largest association of business and professional organizations in the United States.

The issues in the present case—the nature and extent of changes in ownership along with the character and structure of a work group and their impact upon employees, employers, labor organizations and collective bargaining agreements under the National Labor Relations Act, are matters of significant concern in the modern business world.

Although less than twenty five percent (25%) of the work force in the country is represented by labor unions, a large number of these employees are in industries that have a substantial impact upon the national economy. The ever increasing pressure of economic competition has brought with it the judgment of the marketplace requiring the American businessman, both large and small, to exert greater efforts to maintain a healthy and vibrant existence and thus contribute to the overall economic well-being of the nation and its future growth.

The considerations involved in the change of ownership of a business are many and varied. The economic reasons for such changes are equally so. It is essential to the well-being of the American business community that the free flow of economic forces be permitted to operate so as to enable both the healthy business enterprise to prosper, and the ailing one to be rehabilitated.

This case presents the Court with the prospect of reviewing guidelines for the national labor policy which should in large measure, also reflect, the tenuous nature of the contemporary struggle for economic survival. It is the purpose of this brief to focus the Court's attention upon the issues within the parameters of the larger framework of the national business scene and the dual interplay of the national labor and economic policies.

Accordingly, the interest of the National Chamber in the outcome of this litigation is vital and it submits this brief as *amicus curiae*, urging this Court to delineate the

appropriate guidelines in cases of this nature.* The Court's decision here will have consequences reaching far beyond the confines of this dispute, not only for the American business community, but for the nation as well.

I. SUMMARY OF ARGUMENT

A *bona fide* change of ownership of a business enterprise whether because of a sale, merger or other similar type of occurrence, by its very nature, results in a change in the business and to contend that things continue unchanged is to ignore the realities of life.

Likewise, the employees working for such enterprise will find that the circumstances surrounding their employment are also changed. Where the work group has formerly functioned under collective bargaining, there may also be changes, but in varying degrees. To what extent the change of ownership will effect an alteration in the character and structure of the work group is a complex question and the one of primary concern in this appeal.

The National Labor Relations Act guarantees employees freedom of choice as to whether or not they wish to have union representation. Where there is a change in ownership absent unfair labor practices, it should be incumbent upon the Board to consider the change in conditions in light of the statutory rights of the employees. In such instances contrary to the Board's holding in this case, there is no statutory mandate automatically requiring a new or successor employer to bargain with the certified or recognized labor organization unless it is the freely chosen majority representative designated by the employees in the altered work group under a Board conducted election.

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* The Chamber's interest in this case is an extension of its previous concern expressed as an *amicus* in *H. K. Porter Co.; Inc.* v. *NLRB*, 397 US 99 (1970) where the contention urged by the NLRB here was rejected.

The Labor Board here, as well as at various times in other recent decisions, has failed to give due recognition to the intent of Congress and misconceived the proper test to balance the statutory rights of employees, the recognized and necessary interests of employers, and the legitimate goals of labor organizations. The instant case is one such example where it has not only ignored the lack of evidence of any business "relationship" between Wackenhut and Burns, but also the substantial alteration in the character and nature of the work group as a result of the transition between companies and then applied an inflexible and unrealistic design upon the persons involved.

Finally, even if this Court should be inclined to hold otherwise, both the letter and the spirit of the Act clearly spell out the intent of Congress to leave collective bargaining to the parties and for government not to interfere. Thus, even the successor employer should be free to negotiate a contract, based upon its own operational requirements and should not be forced to conduct the business within the confines of an agreement arrived at by another party with perhaps substantially different views on how to conduct such business enterprise.

II. ARGUMENT

A. The National Labor Relations Act is designed to protect the freedom of choice of employees as to the question of Union representation.

As Section 7 of the Act makes clear, Congress intended that employees would have the freedom to decide whether they would or would not be represented by a labor organization of their own choosing.[1]

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[1] This is self-evident from the 1947 statutory amendment "to give employees the right to *refrain* from engaging in activities protected in the original Section 7." *The Developing Labor Law*, Morris, C. J. Ed., p. 40.

> "Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing . . . *and shall also have the right to refrain from any or all such activities* . . ." 29 U.S.C. 157 (emphasis supplied).

The Board is invested by Congress with the responsibility for protecting these employee rights and to insure the freedom of choice and majority rule guaranteed under the Act to accept or reject collective bargaining. *J. I. Case Co.* v. *Labor Board* 321 US 332, 339 (1944). While the right of workers to choose a Union representative is one of the keystones of our national labor policy, the Act no less equally protects the right of such workers to have none. *Garwin* v. *NLRB* (CA DC), 374 F. 2d 295 (1969). Further, the statutory design is insulated from attack regardless of the quarter from which it springs. *Garment Workers Union* v. *NLRB* 366 US 731 (1961).

While the foregoing principles are well established, their applicability in cases involving changes of ownership and/or concomitant changes in the character and structure of a work group are not so settled.

The Board however would have this court believe contrariwise and that the question of when and under what circumstances an employer must recognize and bargain with a union, in the face of a change of ownership, is not in doubt. This Court, however, has never faced the question and has in fact expressly declined to do so in a previous case.

> "In addition, we do not suggest any view or questions surrounding a certified union's claim to continued representative status following a change in ownership." *John Wiley and Sons* v. *Livingston*, 376 US 543, 551 (1964).

Thus it is presented with its first real opportunity to examine the issues involved here.

B. Burns was not a "successor employer" within the framework of the statutory scheme.

In the area of "successorship", the Board has, without this Court ever passing on the question, subordinated the rights of employees to the institutional interests of labor organizations. Its decisions are hardly models of consistency, and raise serious questions of whether the policies of the Act are being effectuated. It is submitted that this case is the proper vehicle for the Court to review the existing dichotomy and establish guidelines for this area of the law consistent with the purposes of the Act.

1. ***The Labor Board here has departed from the correct test in cases involving changes of ownership resulting in the alteration of the work group.***

The establishment of a successorship doctrine that correctly merges the national labor policy and the national economic policy is not an easy task. Neither area should be accorded the type of weight which distorts the end result. There are instances where the proper conclusion is that a change of ownership has not effected any *real* change in the nature and structure of the work group and the application of a successorship doctrine is appropriate.[2]

The Board, and on less frequent occasions, the Courts of Appeal have tended to misunderstand the nature of the changes that have actually taken place by a change in ownership—not in the business sense—but as they affect the group of workers employed—and thus subject to potential collective bargaining rights under Section 9 (a) of the Act.

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[2] Thus, as in the situation, where Company A purchases the entire business of Company B as a going business, and continues to operate it as a going business without in fact any real change in the character or structure of the work group at Company B the certified or lawfully recognized union should be permitted to continue to enjoy its status. Such a conclusion makes clear sense in that it effectuates the choice of the employees within a setting that has not in any *real* sense changed as to the work group.

We submit that where the framework of the setting in which the employees work also changes, even though the employer or business enterprise may otherwise fall within the "classical" definition of successor, the question under the statute is whether the character and structure of the work group employed by that business enterprise has remained unchanged.

The extensive Board and at times Court preoccupation with the identity and continuity of the new or changed business enterprise—i.e., the employing industry, in our judgment places the emphasis on the wrong area under the statutory scheme. The critical inquiry should not be whether there is substantial continuity of the identity of the business enterprise but rather whether there is such continuity of character and structure of the working group as it relates to the environmental framework of collective bargaining. It is not the identity of the employer that should reach out for all of our attention but also the identity and nature of the work group.[3]

A case that illustrates this point well is now pending before this Court on a petition for certiorari. *Ranch-Way, Inc.* 183 *NLRB* No. 116 74 LRRM 1389 (1970) aff'd (CA 10) 445 F.2d 625 (1971) (Docket No. 71-589). The Trial Examiner had originally dismissed the complaint *inter alia*, because the record was not clear whether the employees "may or may not have had a chance to express their sentiments about a Union on a single plant basis . . ." supra, 74 LRRM 1391.[4] The Board reversed him and in its decision totally ignored this factor which

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[3] An excellant example of the proper focus is seen in *Thomas Cadillac, Inc.*, 170 NLRB No. 92, 67 LRRM 1504 (1968) aff'd. as modified (CA DC) 414 F.2d 1135 (1969).

[4] The Ranch-Way case involved the severance of a single small feed mill with a work group of some 25-30 employees from a larger eleven facility enterprise with a single collective bargaining agreement covering some 800 employees. The severance arose because the former owners decided to discontinue the feed mill but local interests stepped in and purchased it.

is the very embodiment of the statutory freedom of choice expressed in Section 7 of the Act.

We submit that the trial examiner in *Ranch-Way* applied the correct test in cases of this kind. By focusing upon the impact the change of ownership had on the work group as altered, he gave due recognition to the Board's proper function under Section 9 of the Act.[5] The Board on the other hand customarily ignored such impact and applied a simplistic approach that does not properly consider the scheme of the Act.

In our view the crucial inquiry should be expressed in two parts:

(1) What change, if any, has occurred in the character and structure of the work group as a result of the change in ownership in the business?

(2) What are the desires of the employees in that work group, as altered, with regard to union representation?

This is not to suggest however that the composition of the work group is the controlling factor but rather to emphasize that it is the structure of that group, as it relates to the environment of collective bargaining, that should be accorded substantially greater importance by the Board than at present.[6]

In many such instances, the new work group is a stranger to the certification and the election upon which it was based. *NLRB* v. *Stepp's Friendly Ford* (CA 9)

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[5] Of course no one, let alone the Board, knows for certain the desires of the employees as to representation in the *altered* group. It is not outside the realm of possibility that if there was originally an eleven facility group vote, the other mills provided a substantial amount of the Union's strength. The point is that the employees in the work group as newly constituted were not accorded freedom of choice as to *their* desires on the question of union representation.

[6] For pre-Burns cases where the Board did give proper consideration see *Northwest Galvanizing Co.* 168 NLRB 26 (1967) *Tallakson Ford, Inc.* 171 NLRB No. 67, 68 LRRM 1136 (1968) *Ellary Lace Corp.* 178 NLRB No. 11, 72 LRRM 1063 (1969).

338 F.2d 833 (1964). Where a portion of a larger group that was certified is severed by a *bona fide* change of ownership, the new work group stands as a different entity separate and apart from the original work one. It is precisely at that point in time when a basic structural change has occurred in the identity of the work group, that it is improper for the Labor Board to impress the employees with continued representation of a labor organization selected at another time and under different foreseeable bargaining circumstances.

We urge the Court to take the opportunity afforded by this case to spell out definitive guideposts enabling the Board, the Courts of Appeal and potential litigants, to make informed judgments on the issues posed. Such a decision here can only have a beneficial effect in reducing the uncertainty which now exists and serve to clarify an important aspect of the national labor policy.

2. The character and structure of the work group was substantially altered as a result of the change from Wackenhut to Burns.

Applying what we consider to be the proper indicia, the Board's finding in this case totally ignored the fact that in changing guard service employers, there had also occurred a change in the character and structure of the work group.

The Wackenhut guards were employed in a group limited to the Lockheed facility and a *separate* labor contract for only that facility was negotiated by Wackenhut with the United Plant Guard Workers of America. Burns, prior to becoming the successful bidder at Lockheed had a labor agreement with a rival guard union, the American Federation of Guards, covering all of the other service contracts which they had throughout Los Angeles County, including the sub-Ontario region.

And while it is true that Burns obviously "followed" Wackenhut in that it supplanted the latter in providing

guard service to Lockheed, the employees involved found themselves faced with being put into a different work group structure and Burns was not, in fact their successor employer.

In *Tri-State Maintenance Corp.* v. *NLRB* 408 F.2d 171 (1968), a case remarkably similar on the facts, involving a change of contractors under a government bidding procedure, not unlike that used by Lockheed, a District of Columbia Circuit panel of Judges Tamm, Burger and Wright, after noting the impact of such change on the character and structure of the work group, concluded:

> "Here, Tri-State had no privity of contract with Frugal or Frugal's employees and it was not a 'successor employer' that bought out the business of another. *John Wiley & Sons* v. *Livingston*" (citation & other cases cited omitted) supra at 408 F.2d 173.

The Court upheld the Board finding that the new contractor was not obligated to bargain with the union and the elementary fact that the right to represent employees is not a permanent relationship which should continue without regard to changing conditions.

Yet the Board, without pausing to consider the desires of the Burns' group, let alone affording them an opportunity to exercise their statutory "freedom of choice". *J. I. Case* v. *Labor Board* supra, turned around and impressed them all under the Wackenhut contract which had been in existence for only a few months and had over 2½ years to run.

The Board, playing the "numbers game", took the position that since the new work group contained 27 former Wackenhut guards and only 15 Burns guards,[7] the majority desired to be represented by the United Plant Guard Workers of America and to have the previous Wackenhut

[7] This, of course, assumes that merely because all of the Wackenhut employees were union members under a compulsory union security clause, they desired continued union representation or even such representation by the U.P.G.W.A.

contract govern their terms and conditions of employment.

The logic, let alone the mathematics of the Board's approach, is not grounded upon a faithful adherence to the spirit of the National Labor Relations Act. Rather it appears to be designed to sublimate such spirit in favor of institutionalizing the interests of one of the two competing labor organizations. The obvious course open to the Board and the easiest one is not acknowledged in its decision, namely a secret ballot election to allow the persons most vitally affected to determine their own destiny.[8]

What is equally disturbing is that the Board has handed down a number of post-Burns decisions which contain situations parallel, if not similar, and are difficult to reconcile. Thus in *Travelodge Corp.* 182 NLRB No. 52, 74 LRRM 1105 (1970) decided simultaneously with *Burns*, the Board gave recognition to the indicia urged here and held (although not in the same language we express herein) that the "degree of continuity in the employing enterprise" was such as to relieve the company of the bargaining obligation under the Act. Yet a reading of the Board's decision reveals great weight accorded to factors ignored in *Burns*.

Likewise in *Lincoln Private Police* 189 NLRB No. 103, 76 LRRM 1727 (1971) the Board concluded that a "totality of the circumstances" persuaded them that the company was relieved of its obligation to recognize and bargain with the Union. We submit that *Lincoln* on the facts is *Burns* in reverse and that the considerations asserted to justify the Board's conclusion there equally buttress the company's position here.[9]

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[8] With the relatively speedy election processes available in light of the 1961 delegation to the Regional Directors, it could seem far more desirable for an election to be held thus, in many instances, avoiding lengthy and costly litigation.

[9] Unlike Burns, the Board in Lincoln extensively discussed the impact of the change of ownership on the character and structure of the work group.

Finally, in a decision issued on December 8, 1971, *Triangle Maintenance Corp.* 194 NLRB No. 85, 78 LRRM 1696, the Board had no difficulty finding that the employer not a successor even though it didn't hire any of the predecessor's employees but had indicated a willingness to do so, albeit at lower wage rates.

C. Even assuming, arguendo, that Burns was a successor, it should not have its predecessor's labor agreement unwillingly imposed upon it.

1. The statute does not confer authority upon the Board to compel the making of labor agreements.

This case in at least one aspect presents another variation of a theme that was rejected less than two (2) years ago by a substantial majority of the present Court —the National Labor Relation Board's continuing attempts to oversee and interdict in substantive collective bargaining.

Looking back over a period of almost thirty-five (35) years this Court has consistently recognized the fundamental policy of freedom of contract by stating on several occasions that the National Labor Relations Act cannot be utilized, even by indirection, to compel a party to agree to a substantive provision of a collective bargaining agreement. In the basic case upholding the constitutionality of the Act this Court stated:

> "*The Act does not compel agreement between employers and employees.* It does not compel any agreement whatever . . . The theory of the Act is that free opportunity for negotiations with accredited representatives of employees *is likely* to promote industrial peace and *may* bring about the adjustments and agreements, which the Act in itself does not attempt to compel." (emphasis supplied) NLRB v. Jones and Laughlin Steel Corp., 301 US 1 45 (1937).

In 1947 Congress felt it necessary to amend the Act because of the Board's attempts to enlarge its authority. The House Committee report specifically referred to the above language from the Court's opinion and said:

> Unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements.[10]

Acting upon this concern as reflected in the Committee's Report, Congress amended the Act to include the present Section 8 (d)[11] and defined the bargaining obligation adding a cautionary note however:

> ". . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." [12]

In discussing the effect of 8 (d) the Court said in *NLRB* v. *American National Insurance Co.*, 343 US 395, 404 (1952):

> "And it is equally clear that the Board may not, either directly or indirectly, compel concessions *or otherwise sit in judgment upon the substantive terms of collective* bargaining agreements." (emphasis supplied)

Recognition of the limitations upon the Board's power in relation to labor agreements was noted in *NLRB* v. *Strong* 393 US 357, at p. 360 (1969) where the Court admitted that the Board had no plenary authority to ad-

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[10] H.R. Rep. No. 245, 80th Cong., 1st Session 19-20 (1947).

[11] "The requirements provided by Congress in Section 8 of the Taft-Hartley amendments, that the parties confer in good faith, were almost identical to the requirements propounded by the Supreme Court in *NLRB* v. *Jones & Laughlin Steel Corp.*" *The Developing Labor Law*, supra at p.275.

[12] 29 U.S.C. § 158 (d).

minister or enforce such agreements. But Justice White, speaking for the majority, went a step further in granting enforcement to the Board's order compelling the employer to adhere to the terms of the collective bargaining agreement, by pointing out that the case did not involve the Board "trespassing on forbidden territory" by its inquiry into whether or not a bargain between the parties had in fact been reached which one side was refusing to honor.[13]

In 1970 however, the Court was presented with a clear case of such transgression by the Board in *H. K. Porter Co., Inc.* v. *National Labor Relations Board* 397 US 99 (1970). All of the participating Justices agreed on the proper and fundamental interpretation of the Board's statutory authority as set forth by Justice Black: [14]

> "The Board's remedial powers under paragraph 10 of the Act are broad but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to do so would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." Supra at p. 108:

The Board's order was denied enforcement and the parties returned to the bargaining table in accord with

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[13] Even the case relied upon by the Court in *Strong* conceded that an employer under the Act, retained the freedom to refuse to make an agreement related to its terms in matters of substance. Supra at 393 US p. 361 citing *H.J. Heinz Co.* v. *Labor Board*, 311 US 514, 524-26 (1940).

[14] Even in dissent Justice Douglas speaking for himself and Justice Stewart agreed that "the Court correctly describes the general design and main thrust of the Act".

the spirit of the statute.[15] Such action by this Court clearly was within the intendment of the federal labor policy decreed by Congress under the Act which was not designed in Justice Jackson's view, to "understake governmental regulation of wages, hours or working conditions", but instead to provide the means by which agreement may be reached with respect to them. *Terminal Assn.* v. *Trainmen* 318 US 1, 6. (1942)

In only its last term this Court acknowledged the "strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements. *Chicago and Northwestern Ry. Co.* v. *United Transportation Union* 402 US 570 579, n.11

Nor would the history of this Court on the subject be complete without reference to the very recent and critical decision (in the view of this amicus), in *Norfolk and Western Ry. Co.* v. *Neimitz* —— US ——, 78 LRRM 2721 issued on November 15, 1971. That case involved the statutory authority of the Interstate Commerce Commission to order the consolidated survivor of a railroad merger to accept and abide by the terms of a labor agreement negotiated by one of the two predecessor railroads.

The dispute centered mainly around the interpretation of Section 5 (2) (f) of the Interstate Commerce Act and whether or not it conferred authority upon the Commission to upset a negotiated agreement between an employer and a union under the Act and to *impose* upon them terms which the Commission believed more appropriate to protect the interests of the employees affected by the merger. The Court dividing 4-3 held that Congress in enacting Sections 5 (f) (2) had evidenced its

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[15] The extent of the *Porter* holding was subsequently acknowledged by the Board in *Ex-Cell-o Corp.* 185 NLRB No. 20, 74 LRRM 1740, 1743 (1970) "But it was never intended, the Court held, that the government in such cases step in and become a party to the negotiations."

intention to permit the Commission to exercise plenary authority of such magnitude.

The significance of the majority holding is obvious to the instant case. The National Labor Relations Board seeks to exercise similar power but in the absence of a Congressional mandate as exists in the Interstate Commerce Act. In turning to the Court for such power, the Board has come to the wrong forum. What it seeks is not to be found here but in the halls of the Congress.

Even the dissenters in *Norfolk & Western* speaking through Justice Blackmun furnish support for the employer's position on the imposition of the Wackenhut contract here for the Justices argued that certain language in Section 5 (2) (f) was intended to suspend the Commission's power in those instances where the parties *voluntarily* arrived at a protective agreement thus reaffirming the "strong federal labor policy against governmental interference with the substantive terms of collective bargaining agreements". Supra at p. —. Thus, *Norfolk & Western*, on either the majority or minority theories, mitigate against the Board's position here on imposing the labor agreement on an unwilling successor.

The Board however, in the face of the foregoing legislative and judicial genealogy now comes before this Court seeking clear authority to "sit in judgment upon the substantive terms of collective bargaining agreements." It claims that the Act requires the imposition of a collective bargaining agreement upon an unwilling party who was not involved in the negotiation of that agreement. Such an interpretation ignores the long line of legislative enactments and judicial authority as well as the fundamental principle reaffirmed by this Court less than twenty-two (22) months ago, "that the National Labor Relations Act is grounded on the premise of freedom of contract," *H. K. Porter* v. *NLRB*, Supra at 397 US ——. In short, the Board's position finds no support in the Act, the case law or the National labor policy.

2. *The Board's Own genealogy is inconsistent with its view of the statute here.*

The Board's current view is that requiring a successor to honor such a contract is necessary in order "to promote industrial peace." The existence of any such alleged necessity, however, is rendered highly dubious by the nature of the Board's own considerable history of dealing with this problem.

The duty of a successor employer to honor the predecessor's unexpired collective bargaining agreement has been a subject of Board litigation for over twenty-five (25) years. Since at least 1949, and until the instant case, the Board had held that no such duty existed. See *Juneau Spruce Corp.*, 82 NLRB 650, 659 (1949); *Jolly Giant Lumber Co.*, 114 NLRB 413, 414 (1955); *General Extrusion Co.*, 121 NLRB 1165 (1958); *Rohlik, Inc.*, 145 NLRB 1236, 1242 (1964); *Triumph Sales, Inc.*, 154 NLRB 916 (1965).

This holding survived at least three (3) presidential tenures and numerous shifts in Board personnel. The purpose of the Act had been, throughout this period, no different than it is now and the need to ensure "industrial peace" was no less a motivating force behind administrative decisions than it is today.

Not even this Court's *Wiley* decision in 1964, on which so much reliance is now placed, was thought by the Board to suggest the need to guarantee "industrial stability" by requiring successor employers to honor contracts not of their making or liking. Thus, in a series of cases arising between 1964 and 1970, the Board steadfastly declined to overrule its previous decisions, declined to question the principles upon which they were premised and refused even to commit itself as to the effect of *Wiley*, if any, on a successor's duty to honor its predecessor's contract. *K. B. & J. Young's Supermarket, Inc.*, 157 NLRB 271 (1966); *Glen Goulding d/b/a Fed-Mart*, 165 NLRB 202 (1967); *Hackney Iron & Steel Co.*, 167 NLRB 613

(1967); *Michaud Bus Lines, Inc.*, 171 NLRB No. 21 68 LRRM 1033 (1968).

Under these circumstances the Board invites skepticism of its now asserted conclusions that the Act, even in light of *Wiley*, compels a successor to adopt the entire contract of its predecessor and that absent such an adoption there will be a loss of "industrial peace." Apart from the consideration that no evidence, as opposed to speculation, has been advanced to demonstrate that the Board's former views led to industrial hostility or upheard over twenty-five (25) years of experience, logic dictates that no such fears are warranted. A successor which takes over a successful enterprise is hardly likely to invite labor discord and disruption; where contractual terms have shown themselves to be profitable to all, there is no reason in economic common-sense to suppose that a successor employer will jeopardize his investment with an effort to enforce less desirable terms on its work force. Where the enterprise is marginal or worse, the interests of industrial stability are advanced by permitting the successor employer the flexibility to make such changes as will allow the business to revive and gain new strength which as a direct consequence, will allow the employees to achieve a greater measure of job security.

3. *The Court's decision in the Wiley case does not support the Board's position here.*

The Board's attempt to find support for its position in the Court's decision in *John Wiley and Sons* v. *Livingston*, supra, is based upon faulty legal analysis and a gross overstatement of the decision.[16]

As the court well knows, *Wiley* involved the obligation of the surviving company in a statutory merger to arbi-

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[16] The correct holding of *Wiley* is set forth in *Printing Pressman* v. *Pride Papers Corp.* (CA. 2) 445 F.2d 361 (1971) cert. den'd —— US ——, Dec. 20, 1971: "The only obligations that have been imposed by the Courts on successor employers are the obligations to arbitrate". at 445 F.2d 364, citing *Wiley*.

trate "vested" claims under a collective bargaining agreement to which the merged Company was a party.[17] Thus the holding in *Wiley* was entirely retrospective and dealt only with rights which the Court described as "accrued" or "vested" under a pre-existing contract. The Court simply decided that the arbitration clause had survived the merger for the purpose of resolving the disputes over the "vested" rights which arose prior thereto.

Such a holding is a far cry from the Board's attempt to apply the entire contract *prospectively* to the successor employer who had no part in negotiating it. The Board's reliance on *Wiley* is not only unwarranted but also ignores the Court's admonition in the opinion:

> "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives." Supra at 376 US ——.

The Labor Board throughout its brief relies heavily on *Wiley*. We submit that in so doing they have overstated the Court's holding which on the narrow situation presented there, does not appear unreasonable in view of the retrospective nature of the setting.

But the Court in *Wiley* did not consider the basic question of what constitutes a "successor", within the meaning of the National Labor Relations Act much less the question of what obligations would flow from the successor relationship when and if it existed. Under these circumstances, the Board's adoption of a general rule prospectively imposing a collective bargaining agreement upon an unwilling successor cannot be said to find any real support in *Wiley*.

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[17] The form of the merger should not be overlooked, for under most state corporation laws the surviving company is required as a matter of law, with or without its consent, to assume the outstanding obligations of *both* precedessor concerns prior to their consolidation. Thus in *Wiley*, the Court referred to Section 90 of the N. Y. Stock corporation law which contained just such an express provision.

Thus, this Court, in effect, approaches this particular matter for the first time and must chart a course consistent with both the letter and the spirit of the statute as enacted by the Congress.

4. ***The desirable approach, and as Congress intended, is to permit the Union and a successor employer freedom to negotiate their own collective bargaining agreement.***

The Board's position represents an unparalleled intrusion into the internal operations of private business. The Board seeks nothing less than the authority to dictate without regard to the conditions existing at the time of a sale or change of ownership and the effect upon the character and structure of the work group, that the successor employer, and in many cases the employees, shall have impressed upon it an alien collective bargaining agreement and be told to attempt to conduct the business irrespective of the consequences. Under such circumstances the forced assumption of the agreement makes no sense. As Board Member Jenkins observed in his dissent in *Burns*:

> "Where the enterprise is marginal or fettering, the new management may have to rearrange the terms and conditions of employment if the business and the jobs are to survive." *Burns International Detective Agency*, 182 NLRB No. 50, 74 LRRM 1098, 1101.

As stated earlier, this case involves not only the national labor policy, but the national economic policy as well. If this Court holds that the institutional interests of business must yield to require Burns to recognize and bargain with the Union, so too must the institutional interests of the Union yield to permit the employer to maintain a degree of responsibility and control over the operations, as Burns would conduct them.

In essence, the employer, under the circumstances existing here, is being deprived of a substantial measure

of control and told to operate within the framework of a structure which he had no part in framing. Such a result bears no favorable consequences for those engaged in the struggle for business survival.

The facts of the present case graphically demonstrate this is undesirable. With guard service provided to Lockhead on a one year contract basis, the Board's position is to allow the three-year labor agreement entered into by Wackenhut and the Union to be binding, not only on Wackenhut, but also on the successive independent compaines, if they change yearly. Theoretically this permits Wackenhut and the Union to dictate the business operations of other independent companies, all of whom may be direct competitors of Wackenhut. In a "service industry" such as the providing of plant protection service, generally the only variable in which productivity of efficiency gains can be made is labor. Thus in a very real sense, the contract negotiated by Wackenhut (a scant two months before the contract came up for bid) would not only dictate the business operations of its competitors, but would also prevent those competitors from instituting changes in efficiency which they deemed desirable.

The Board's attempted palliative to the effect that it will consider "unusual circumstances," *Emerald Maintenance, Inc.*, 188 NLRB No. 139, 76 LRRM 1437 (1971), simply creates additional problems. First, because every case will be litigated to the Board and Courts on the basis of "unusual circumstances." Second, because the exception removes all of the purported "benefits" in terms of certainty which the Board credits to the rule.[18] Finally,

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[18] The Board argues in its brief that "there are advantages to a prospective purchaser in knowing that he has a stable labor relationship when he takes over the work (Board Brief p. 32). This is not a realistic statement to any informed observer of the labor relations scene. The existence of a collective bargaining agreement is not, *ipso facto*, a guarantee of either labor stability or even labor peace. See *Boy's Market* v. *Retail Clerks Union Local 770* 398 US

as the Court below recognized, this "merely arrogates to the Board the additional power to pick and choose among the contractual provisions it will impose on non-contracting parties."

The Board alludes in *Burns* to a non-existent safety valve for the successor employer when it contends he can make "adjustments" for problems under the labor contract in his negotiations for the acquisition of the business. While this may be true as to those visible economic areas such as accrued vacation pay, etc. it does not follow for many areas that are not expressed in such direct economic terms.[19]

Of interest is that the Board makes no reference to the climate for adjustments by the Union at the time of the change of ownership probably because the Board recognizes that their general attitude may be one of inflexibility and lack of concern for "management's problems".

We believe that Board Member Jenkins in his dissent in *Burns* correctly and accurately stated the amalgam of both the national labor and economic policies,

> ". . . our goal should be to permit the parties flexibility in working out their new arrangements if either desires to do so, rather than to impose the existing agreement when one side may be seriously dissatisfied with it. The new employer is not a party to the agreement, and the Union did not join in shaping and executing it with his circumstances in mind. Thus, to impose the agreement on the new relation (sic) may in many cases prove a source of friction and disruption, rather than the stability for which my colleagues hope." Supra at 74 LRRM 1102.

235, (1970). Further it may be the *fixed* nature of the labor agreement that has driven the employer to the point at which he sells out or seeks merger. See *Lincoln Private Police*, supra.

[19] For example, a highly restrictive clause against obtaining expensive tools and dies from less costly outside sources is totally incapable of "adjustment" during the acquisition talks.

The practical difficulty with the Board's position is best illustrated by its decision in *Interstate 65 Corp.* 186 NLRB No. 41 75 LRRM 1403 (1970) where it saddled the foreclosing creditor of a failing motel operation with a union contract in the face of efforts to save the business by a drastic change in the type of service to be offered to potential patrons.[20]

Speculating that the foreclosing party *may* have made some adjustments (although admittedly the record was barren of any evidence thereof) the Board effectively precluded any relief being obtained under the labor agreement to assist in the rehabilitation efforts that would not only contribute to saving the business but the jobs of some 60 employees as well.

Employers must be accorded a certain degree of flexibility to conduct their businesses and enable them to cope with the exigencies of the marketplace. After all, a stable and secure employer is the best insurance against job insecurity for both the employees and any chosen collective bargaining representative.

In *Emerald Maintenance*, supra, the Board confirmed the the true rationale for its Burns holding was to provide "continuity of employment and stability of employment terms to both employees and employers in enterprises undergoing ownership changes." Not only is such an objective beyond the pale of the agency's responsibility as delegated by Congress but it is a misguided attempt to petrify a prior existing relationship at the very moment when various economic forces have brought about the necessity for a change. It is not the function of the Labor Board, as created by Congress, to sit as an economic czar using its powers to apply its own brand of

[20] The Board requirement that the creditor-owner bargain with the union as the representative of the employees was correct under the rule suggested elsewhere in this brief since there was no real change in the character or structure of the work group because of the change of ownership.

industrial and economic justice and it should be so advised by this Court.

III. CONCLUSION

For the foregoing reasons the decision of the Court below should be affirmed as to its finding that the Wackenhut labor agreement was not binding upon Burns and reversed as to the order of the Board holding the latter guilty of a refusal to bargain in violation of Section 8(a)(5) for not recognizing and bargaining with the United Plant Guard Workers of America.

Respectfully submitted,

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January 3, 1972

NATIONAL LABOR RELATIONS BOARD *v.* BURNS INTERNATIONAL SECURITY SERVICES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71-123. Argued January 13, 1972—Decided May 15, 1972*

Wackenhut Corp., a company that had provided plant protection service for a Lockheed Aircraft Service Co. factory, had entered into a collective-bargaining agreement with the United Plant Guard Workers (UPG), the union certified by the National Labor Relations Board (NLRB) as the representative of a majority of Wackenhut guards at the plant after an NLRB election. A few months later, Wackenhut's service contract expired, and it was succeeded by Burns International Security Services, which knew of the collective-bargaining agreement. Burns employed 27 of the 42 Wackenhut guards but refused to recognize UPG or to honor the agreement, and denied any obligation to bargain with UPG. The NLRB found that Burns violated §§ 8 (a) (5) and 8 (a) (1) of the National Labor Relations Act by failing to recognize and bargain with UPG and by refusing to honor the collective-bargaining agreement, and ordered Burns to abide by the terms of the agreement and to "give retroactive effect to all the clauses of said [Wackenhut] contract and, with interest of 6 percent, make whole its employees for any losses suffered by reason of Respondent's [Burns'] refusal to honor, adopt and enforce said contract." The Court of Appeals held that the NLRB had exceeded its powers in ordering Burns to honor the contract executed by Wackenhut. *Held:*

1. Where the bargaining unit remained unchanged and a majority of the employees hired by the new employer were represented by a recently certified bargaining agent, the NLRB correctly implemented the express mandates of §§ 8 (a) (5) and 9 (a) of the Act by ordering the new employer, Burns, to bargain with the incumbent union, UPG. Pp. 277-281.

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*Together with No. 71-198, *Burns International Security Services, Inc.* v. *National Labor Relations Board et al.*, also on certiorari to the same court.

2. While successor employers may be bound to recognize and bargain with the incumbent union, they are not bound by the substantive provisions of a collective-bargaining agreement negotiated by their predecessors but not agreed to or assumed by them. *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, distinguished. Pp. 281–291.

3. The NLRB's order for monetary restitution to Burns' employees cannot be sustained on the ground that Burns committed an unfair labor practice by unilaterally changing existing terms and conditions of employment. Burns had no previous relationship to the unit and no outstanding terms and conditions of employment, so that Burns did not change *its* terms and conditions of employment when it specified the initial basis on which it would hire employees when it inaugurated its protection service at the plant. Pp. 292–296.

441 F. 2d 911, affirmed.

WHITE, J., delivered the opinion for a unanimous Court in No. 71–123, and for the Court in No. 71–198, in which DOUGLAS, STEWART, MARSHALL, and BLACKMUN, JJ., joined. REHNQUIST, J., filed an opinion concurring in No. 71–123 and dissenting in No. 71–198, in which BURGER, C. J., and BRENNAN and POWELL, JJ., joined, *post*, p. 296.

Norton J. Come argued the cause for the National Labor Relations Board, petitioner in No. 71–123 and respondent in No. 71–198. With him on the brief were *Solicitor General Griswold, Harry R. Sachse, Peter G. Nash,* and *Nancy M. Sherman.*

Charles G. Bakaly, Jr., argued the cause for Burns International Security Services, Inc., respondent in No. 71–123 and petitioner in No. 71–198. With him on the brief was *Seymour Swerdlow.*

Gordon A. Gregory argued the cause and filed a brief for International Union, United Plant Guard Workers of America, et al., respondents in both cases.

Briefs of *amici curiae* were filed by *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* for the American

Federation of Labor and Congress of Industrial Organizations, and by *Milton A. Smith* and *Jay S. Siegel* for the Chamber of Commerce of the United States.

MR. JUSTICE WHITE delivered the opinion of the Court.

Burns International Security Services, Inc. (Burns), replaced another employer, the Wackenhut Corp. (Wackenhut), which had previously provided plant protection services for the Lockheed Aircraft Service Co. (Lockheed) located at the Ontario International Airport in California. When Burns began providing security service, it employed 42 guards; 27 of them had been employed by Wackenhut. Burns refused, however, to bargain with the United Plant Guard Workers of America (UPG) which had been certified after a National Labor Relations Board (Board) election as the exclusive bargaining representative of Wackenhut's employees less than four months earlier. The issues presented in this case are whether Burns refused to bargain with a union representing a majority of employees in an appropriate unit and whether the National Labor Relations Board could order Burns to observe the terms of a collective-bargaining contract signed by the union and Wackenhut that Burns had not voluntarily assumed. Resolution turns to a great extent on the precise facts involved here.

I

The Wackenhut Corp. provided protection services at the Lockheed plant for five years before Burns took over this task. On February 28, 1967, a few months before the changeover of guard employers, a majority of the Wackenhut guards selected the union as their exclusive bargaining representative in a Board election after Wackenhut and the union had agreed that the Lockheed plant was the appropriate bargaining unit. On March 8,

the Regional Director certified the union as the exclusive bargaining representative for these employees, and, on April 29, Wackenhut and the union entered into a three-year collective-bargaining contract.

Meanwhile, since Wackenhut's one-year service agreement to provide security protection was due to expire on June 30, Lockheed had called for bids from various companies supplying these services, and both Burns and Wackenhut submitted estimates. At a pre-bid conference attended by Burns on May 15, a representative of Lockheed informed the bidders that Wackenhut's guards were represented by the union, that the union had recently won a Board election and been certified, and that there was in existence a collective-bargaining contract between Wackenhut and the union. App. 4–5, 126.[1] Lockheed then accepted Burns' bid, and on May 31 Wackenhut was notified that Burns would assume responsibility for protection services on July 1. Burns chose to retain 27 of the Wackenhut guards, and it brought in 15 of its own guards from other Burns locations.

During June, when Burns hired the 27 Wackenhut guards, it supplied them with membership cards of the American Federation of Guards (AFG), another union with which Burns had collective-bargaining contracts at other locations, and informed them that they had to become AFG members to work for Burns, that they would not receive uniforms otherwise, and that Burns "could not live with" the existing contract between Wackenhut and the union. On June 29, Burns recognized the AFG on the theory that it had obtained a card majority. On July 12, however, the UPG demanded that Burns recog-

[1] A Burns executive later admitted in the unfair-labor-practice proceeding that Burns was aware of the union's status, the unit certification, and the collective-bargaining contract after the May 15 meeting. App. 105.

nize it as the bargaining representative of Burns' employees at Lockheed and that Burns honor the collective-bargaining agreement between it and Wackenhut. When Burns refused, the UPG filed unfair labor practice charges, and Burns responded by challenging the appropriateness of the unit and by denying its obligation to bargain.

The Board, adopting the trial examiner's findings and conclusions, found the Lockheed plant an appropriate unit and held that Burns had violated §§ 8 (a)(2) and 8 (a)(1) of the National Labor Relations Act, 49 Stat. 452, as amended, 61 Stat. 140, 29 U. S. C. §§ 158 (a)(2), 158 (a)(1), by unlawfully recognizing and assisting the AFG, a rival of the UPG; and that it had violated §§ 8 (a)(5) and 8 (a)(1), 29 U. S. C. §§ 158 (a)(5), 158 (a)(1), by failing to recognize and bargain with the UPG and by refusing to honor the collective-bargaining agreement that had been negotiated between Wackenhut and UPG.[2]

Burns did not challenge the § 8 (a)(2) unlawful assistance finding in the Court of Appeals but sought review of the unit determination and the order to bargain and observe the pre-existing collective-bargaining contract. The Court of Appeals accepted the Board's unit determination and enforced the Board's order insofar as it

[2] In regard to this latter finding, the Board stated:

"The question before us thus narrows to whether the national labor policy embodied in the Act requires the successor-employer to take over and honor a collective-bargaining agreement negotiated on behalf of the employing enterprise by the predecessor. We hold that, absent unusual circumstances, the Act imposes such an obligation.

"We find, therefore, that Burns is bound to that contract as if it were a signatory thereto, and that its failure to maintain the contract in effect is violative of Sections 8 (d) and 8 (a)(5) of the Act."

related to the finding of unlawful assistance of a rival union and the refusal to bargain, but it held that the Board had exceeded its powers in ordering Burns to honor the contract executed by Wackenhut. Both Burns and the Board petitioned for certiorari, Burns challenging the unit determination and the bargaining order and the Board maintaining its position that Burns was bound by the Wackenhut contract, and we granted both petitions, though we declined to review the propriety of the bargaining unit, a question which was presented in No. 71–198. 404 U. S. 822 (1971).

II

We address first Burns' alleged duty to bargain with the union, and in doing so it is well to return to the specific provisions of the Act, which courts and the Board alike are bound to observe. Section 8 (a)(5), as amended by the Labor Management Relations Act, 1947, 29 U. S. C. § 158 (a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title." Section 159 (a) provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ." Because the Act itself imposes a duty to bargain with the representative of a majority of the employees in an appropriate unit, the initial issue before the Board was whether the charging union was such a bargaining representative.

The trial examiner first found that the unit designated by the regional director was an appropriate unit for bargaining. The unit found appropriate was defined as "[a]ll full-time and regular part-time employees of

[Burns] performing plant protection duties as determined in Section 9 (b)(3) of the [National Labor Relations] Act at Lockheed, Ontario International Airport; excluding office clerical employees, professional employees, supervisors, and all other employees as defined in the Act." This determination was affirmed by the Board, accepted by the Court of Appeals, and is not at issue here because pretermitted by our limited grant of certiorari.

The trial examiner then found, *inter alia,* that Burns "had in its employ a majority of Wackenhut's former employees," and that these employees had already expressed their choice of a bargaining representative in an election held a short time before. Burns was therefore held to have a duty to bargain, which arose when it selected as its work force the employees of the previous employer to perform the same tasks at the same place they had worked in the past.

The Board, without revision, accepted the trial examiner's findings and conclusions with respect to the duty to bargain, and we see no basis for setting them aside. In an election held but a few months before, the union had been designated bargaining agent for the employees in the unit and a majority of these employees had been hired by Burns for work in the identical unit. It is undisputed that Burns knew all the relevant facts in this regard and was aware of the certification and of the existence of a collective-bargaining contract. In these circumstances, it was not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees and that Burns could not reasonably have entertained a good-faith doubt about that fact. Burns' obligation to bargain with the union over terms and conditions of employment stemmed from its hiring of Wackenhut's employees and from the recent election and

Board certification. It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an "unusual circumstance" as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer. *NLRB* v. *Downtown Bakery Corp.*, 330 F. 2d 921, 925 (CA6 1964); *NLRB* v. *McFarland*, 306 F. 2d 219, 221 (CA10 1962); *NLRB* v. *Auto Ventshade, Inc.*, 276 F. 2d 303, 307 (CA5 1960); *NLRB* v. *Lunder Shoe Corp.*, 211 F. 2d 284, 286 (CA1 1954); *NLRB* v. *Armato*, 199 F. 2d 800, 803 (CA7 1952); *South Carolina Granite Co.*, 58 N. L. R. B. 1448, 1463–1464 (1944), enforced *sub nom. NLRB* v. *Blair Quarries, Inc.*, 152 F. 2d 25 (CA4 1945); *Northwest Glove Co.*, 74 N. L. R. B. 1697, 1700 (1947); *Johnson Ready Mix Co.*, 142 N. L. R. B. 437, 442 (1963).[3]

It goes without saying, of course, that Burns was not entitled to upset what it should have accepted as an established union majority by soliciting representation

[3] Cf. § 9 (c) (3) of the NLRA, 29 U. S. C. § 159 (c) (3), which provides that "[n]o election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held." See *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 599 n. 14 (1969).

Where an employer remains the same, a Board certification carries with it an almost conclusive presumption that the majority representative status of the union continues for a reasonable time, usually a year. See *Brooks* v. *NLRB*, 348 U. S. 96, 98–99 (1954). After this period, there is a rebuttable presumption of majority representation. *Celanese Corp. of America*, 95 N. L. R. B. 664, 672 (1951). If there is a change of employers, however, and an almost complete turnover of employees, the certification may not bar a challenge if the successor employer is not bound by the collective-bargaining contract, particularly if the new employees are represented by another union or if the old unit is ruled an accretion to another unit. Cf. *McGuire* v. *Humble Oil & Refining Co.*, 355 F. 2d 352 (CA2), cert. denied, 384 U. S. 988 (1966). See n. 5, *infra*.

cards for another union and thereby committing the unfair labor practice of which it was found guilty by the Board. That holding was not challenged here and makes it imperative that the situation be viewed as it was when Burns hired its employees for the guard unit, a majority of whom were represented by a Board-certified union. See *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575, 609, 610–616 (1969).

It would be a wholly different case if the Board had determined that because Burns' operational structure and practices differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one.[4] Likewise, it would be different if Burns had not hired employees already represented by a union certified as a bargaining agent,[5] and the Board recognized as

[4] The Court of Appeals was unimpressed with the asserted differences between Burns' and Wackenhut's operations: "All of the important factors which the Board has used and the courts have approved are present in the instant case: 'continuation of the same types of product lines, departmental organization, employee identity and job functions.' . . . Both Burns and Wackenhut are nationwide organizations; both performed the identical services at the same facility; although Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors; and finally, and perhaps most significantly, Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42." 441 F. 2d 911, 915 (1971) (citation omitted). Although the labor policies of the two companies differed somewhat, the Board's determination that the bargaining unit remained appropriate after the changeover meant that Burns would face essentially the same labor relations environment as Wackenhut: it would confront the same union representing most of the same employees in the same unit.

[5] The Board has never held that the National Labor Relations Act itself requires that an employer who submits the winning bid for a service contract or who purchases the assets of a business be obligated to hire all of the employees of the predecessor though it is possible that such an obligation might be assumed by the employer. But cf. *Chemrock Corp.*, 151 N. L. R. B. 1074 (1965). However, an employer who declines to hire employees solely because

much at oral argument.[6] But where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of § 8 (a)(5) and § 9 (a) by ordering the employer to bargain with the incumbent union. This is the view of several courts of appeals and we agree with those courts. *NLRB* v. *Zayre Corp.*, 424 F. 2d 1159, 1162 (CA5 1970); *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F. 2d 1025, 1026–1027 (CA7 1969); *S. S. Kresge Co.* v. *NLRB*, 416 F. 2d 1225, 1234 (CA6 1969); *NLRB* v. *McFarland*, 306 F. 2d, at 220.

III

It does not follow, however, from Burns' duty to bargain that it was bound to observe the substantive terms

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they are members of a union commits a § 8 (a)(3) unfair labor practice. See *K. B. & J. Young's Super Markets, Inc.* v. *NLRB*, 377 F. 2d 463 (CA9), cert. denied, 389 U. S. 841 (1967); *NLRB* v. *New England Tank Industries, Inc.*, 302 F. 2d 273 (CA1), cert. denied, 371 U. S. 875 (1962); *Piasecki Aircraft Corp.* v. *NLRB*, 280 F. 2d 575 (CA3 1960), cert. denied, 364 U. S. 933 (1961); *Tri State Maintenance Corp.*, 167 N. L. R. B. 933 (1967), enforced with mod. *sub nom. Tri State Maintenance Corp.* v. *NLRB*, 132 U. S. App. D. C. 368, 408 F. 2d 171 (1968). Further restrictions on the successor employer's choice of employees would seem to follow from the Board's instant decision that the employer must honor the pre-existing collective-bargaining contract. See *infra*, at 288–290.

[6] "Q. But [counsel for the Union], when he argued, said that even if [Burns] hadn't taken over any [employees of Wackenhut], even if they hadn't taken over a single employee, the legal situation would be the same.

"Mr. Come [for the NLRB]. We do not go that far. We don't think that you have to go that far in——

"Q. Do you think it has to be a majority?

"Mr. Come. I wouldn't say that it has to be a majority, I think it has to be a substantial number. It has to be enough to give you a continuity of employment conditions in the bargaining unit." Tr. of Oral Arg. 64–65.

of the collective-bargaining contract the union had negotiated with Wackenhut and to which Burns had in no way agreed. Section 8 (d) of the Act expressly provides that the existence of such bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession." Congress has consistently declined to interfere with free collective bargaining[7] and has preferred that device, or voluntary arbitration, to the imposition of compulsory terms as a means of avoiding or terminating labor disputes. In its report accompanying the 1935 Act, the Senate Committee on Education and Labor stated:

> "The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory." S. Rep. No. 573, 74th Cong., 1st Sess., 12 (1935).

This Court immediately noted this fundamental theme of the legislation: "[The Act] does not compel any agreement whatever. . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements

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[7] Two exceptions to this general reluctance to interfere with free collective bargaining are the imposition of compulsory arbitration during wartime, Exec. Order No. 9017 (1942), and, on occasion, in the railroad industry, 77 Stat. 132, 81 Stat. 122. Congress has consistently rejected compulsory arbitration even as a remedy for "national emergency" disputes, however. See Goldberg, The Labor Law Obligations of a Successor Employer, 63 Nw. U. L. Rev. 735, 742–743 (1969).

which the Act in itself does not attempt to compel." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937). See also *NLRB* v. *American National Insurance Co.*, 343 U. S. 395, 401–402 (1952); *Teamsters Local 357* v. *NLRB*, 365 U. S. 667, 676–677 (1961).

Section 8 (d), 29 U. S. C. § 158 (d), made this policy an express statutory mandate, and was enacted in 1947 because Congress feared that "the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. . . . [U]nless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements." H. R. Rep. No. 245, 80th Cong., 1st Sess., 19–20 (1947).

This history was reviewed in detail and given controlling effect in *H. K. Porter Co., Inc.* v. *NLRB*, 397 U. S. 99 (1970). There this Court, while agreeing that the employer violated § 8 (a)(5) by adamantly refusing to agree to a dues checkoff intending thereby to frustrate the consummation of any bargaining agreement, held that the Board had erred in ordering the employer to agree to such a provision:

> "[W]hile the Board does have power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement.
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> . . . . . .
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> "It would be anomalous indeed to hold that while § 8 (d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel

agreement in that same dispute. The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract." 397 U. S., at 102, 108 (citations omitted).

These considerations, evident from the explicit language and legislative history of the labor laws, underlay the Board's prior decisions, which until now have consistently held that, although successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions of a collective-bargaining contract negotiated by their predecessors but not agreed to or assumed by them. *Rohlik, Inc.*, 145 N. L. R. B. 1236, 1242 n. 15 (1964); *General Extrusion Co., Inc.*, 121 N. L. R. B. 1165, 1168 (1958); *Jolly Giant Lumber Co.*, 114 N. L. R. B. 413, 414 (1955); *Slater System Maryland, Inc.*, 134 N. L. R. B. 865, 866 (1961); *Matter of ILWU (Juneau Spruce)*, 82 N. L. R. B. 650, 658–659 (1949), enforced, 189 F. 2d 177 (CA9 1951), aff'd on other grounds, 342 U. S. 237 (1952). As the Court of Appeals said in this case, "In none of the previous successorship cases has the Board ever reached that result. The successor has always been held merely to have the duty of bargaining with his predecessor's union." 441 F. 2d, at 915.

[8] When the union that has signed a collective-bargaining contract is decertified, the succeeding union certified by the Board is not bound by the prior contract, need not administer it, and may demand negotiations for a new contract, even if the terms of the old contract have not yet expired. *American Seating Co.*, 106 N. L. R. B. 250 (1953); *Farmbest, Inc.*, 154 N. L. R. B. 1421, 1453–1454 (1965), enf. with mod. *sub nom. Farmbest, Inc.* v. *NLRB*, 370 F. 2d 1015 (CA8 1967); see also *Modine Mfg. Co.* v. *International Association of Machinists*, 216 F. 2d 326 (CA6 1954). The Board has declined to overturn its "long standing" *American Seating* rule after *Burns*. *General Dynamics Corp.*, 184 N. L. R. B. No. 71 (1970).

The Board, however, has now departed from this view and argues that the same policies that mandate a continuity of bargaining obligation also require that successor employers be bound to the terms of a predecessor's collective-bargaining contract. It asserts that the stability of labor relations will be jeopardized and that employees will face uncertainty and a gap in the bargained-for terms and conditions of employment, as well as the possible loss of advantages gained by prior negotiations, unless the new employer is held to have assumed, as a matter of federal labor law, the obligations under the contract entered into by the former employer. Recognizing that under normal contract principles a party would not be bound to a contract in the absence of consent, the Board notes that in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 550 (1964), the Court declared that "a collective bargaining agreement is not an ordinary contract" but is rather an outline of the common law of a particular plant or industry. The Court held in *Wiley* that although the predecessor employer which had signed a collective-bargaining contract with the union had disappeared by merger with the successor, the union could compel the successor to arbitrate the extent to which the successor was obligated under the collective-bargaining agreement. The Board contends that the same factors that the Court emphasized in *Wiley*, the peaceful settlement of industrial conflicts and "protection [of] the employees [against] a sudden change in the employment relationship," *id.*, at 549, require that Burns be treated under the collective-bargaining contract exactly as Wackenhut would have been if it had continued protecting the Lockheed plant.

We do not find *Wiley* controlling in the circumstances here. *Wiley* arose in the context of a § 301 suit to compel arbitration, not in the context of an unfair labor practice proceeding where the Board is expressly limited by the provisions of § 8 (d). That

decision emphasized "[t]he preference of national labor policy for arbitration as a substitute for tests of strength before contending forces" and held only that the agreement to arbitrate, "construed in the context of a national labor policy," survived the merger and left to the arbitrator, subject to judicial review, the ultimate question of the extent to which, if any, the surviving company was bound by other provisions of the contract. *Id.*, at 549, 551.

Wiley's limited accommodation between the legislative endorsement of freedom of contract and the judicial preference for peaceful arbitral settlement of labor disputes does not warrant the Board's holding that the employer commits an unfair labor practice unless he honors the substantive terms of the pre-existing contract. The present case does not involve a § 301 suit; nor does it involve the duty to arbitrate. Rather, the claim is that Burns must be held bound by the contract executed by Wackenhut, whether Burns has agreed to it or not and even though Burns made it perfectly clear that it had no intention of assuming that contract. *Wiley* suggests no such open-ended obligation. Its narrower holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation. See N. Y. Stock Corp. Law § 90 (1951); 15 W. Fletcher, Private Corporations § 7121 (1961 rev. ed.). Here there was no merger, sale of assets, and there were no dealings whatsoever between Wackenhut and Burns. On the contrary, they were competitors for the same work, each bidding for the service contract at Lockheed. Burns purchased nothing from Wackenhut and became liable for none of its financial obligations. Burns merely hired enough of Wackenhut's employees to require it to bargain with the union as commanded by § 8 (a)(5) and § 9 (a).

But this consideration is a wholly insufficient basis for implying either in fact or in law that Burns had agreed or must be held to have agreed to honor Wackenhut's collective-bargaining contract.

We agree with the Court of Appeals that the Board failed to heed the admonitions of the *H. K. Porter* case. Preventing industrial strife is an important aim of federal labor legislation, but Congress has not chosen to make the bargaining freedom of employers and unions totally subordinate to this goal. When a bargaining impasse is reached, strikes and lockouts may occur. This bargaining freedom means both that parties need not make any concessions as a result of Government compulsion and that they are free from having contract provisions imposed upon them against their will. Here, Burns had notice of the existence of the Wackenhut collective-bargaining contract, but it did not consent to be bound by it. The source of its duty to bargain with the union is not the collective-bargaining contract but the fact that it voluntarily took over a bargaining unit that was largely intact and that had been certified within the past year. Nothing in its actions, however, indicated that Burns was assuming the obligations of the contract, and "allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H. K. Porter Co.* v. *NLRB*, 397 U. S., at 108.

We also agree with the Court of Appeals that holding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, com-

position of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

The Board's position would also raise new problems, for the successor employer would be circumscribed in exactly the same way as the predecessor under the collective-bargaining contract. It would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contract and subject to the grievance and arbitration provisions thereof.[9] Burns would not have been free to replace Wackenhut's guards with its own except as the contract permitted. Given the continuity of employment relationship, the pre-existing

[9] The vast majority of collective-bargaining agreements specify the procedures to be used in choosing employees for available jobs, and approximately 92% of all such contracts place some limitations on the right to discharge. Collective Bargaining Negotiations and Contracts §§ 40:1, 60:11 (BNA 1971). Under the Board's theory, if a successor refused to hire or fired any of the predecessor's employees without going through applicable grievance procedures, it might be guilty of a § 8(a)(5) refusal to bargain. See *NLRB* v. *Strong*, 393 U. S. 357, 359 (1969); *NLRB* v. *Huttig Sash & Door Co., Inc.*, 377 F. 2d 964, 968–969 (CA8 1967).

contract's provisions with respect to wages, seniority rights, vacation privileges, pension and retirement fund benefits, job security provisions, work assignments and the like would devolve on the successor. Nor would the union commit a § 8 (b)(3) unfair labor practice if it refused to bargain for a modification of the agreement effective prior to the expiration date of the agreement.[10] A successor employer might also be deemed to have

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[10] Section 8 (d) of the Act provides, in part:

"[W]here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

"The duties imposed upon employers, employees, and labor organizations by paragraphs (2)–(4) of this subsection . . . shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." 29 U. S. C. § 158 (d).

inherited its predecessor's pre-existing contractual obligations to the union that had accrued under past contracts and that had not been discharged when the business was transferred. "[A] successor may well acquire more liabilities as a result of *Burns* than appear on the face of a contract." [11]. Finally, a successor will be bound to observe the contract despite good-faith doubts about the union's majority during the time that the contract is a bar to another representation election, *Ranch-Way, Inc,* 183 N. L. R. B. No. 116 (1970).[12] For the above reasons, the Board itself has expressed doubts as to the general applicability of its *Burns* rule.[13]

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[11] Doppelt, Successor Companies: The NLRB Limits the Options—and Raises Some Problems, 20 DePaul L. Rev. 176, 191 (1971).

[12] The Board imposes this contract-bar rule for the term of a collective bargaining of "reasonable duration," a period the Board now defines as three years. *General Cable Corp.*, 139 N. L. R. B. 1123 (1962). Also during this time, an employer cannot use doubt about a union's majority as a defense to a refusal-to-bargain charge. *Oilfield Maintenance Co., Inc.*, 142 N. L. R. B. 1384, 1387 (1963); *Hexton Furniture Co.*, 111 N. L. R. B. 342 (1955). Prior to *Burns*, the Board had held that a successor was barred by the contract of the predecessor from requesting a representation election during the term of the contract only if it had assumed the contract. *Jolly Giant Lumber Co.*, 114 N. L. R. B. 413 (1955); *General Extrusion Co., Inc.*, 121 N. L. R. B. 1165 (1958); *MV Dominator*, 162 N. L. R. B. 1514 (1967). Moreover, such assumption had to be by an express written agreement. *American Concrete Pipe of Hawaii, Inc.*, 128 N. L. R. B. 720 (1960). The Board had also permitted a non-assuming successor to raise a good-faith doubt as to the union's majority as a defense to a refusal-to-bargain charge during the term of the old contract. *Randolph Rubber Co., Inc.*, 152 N. L. R. B. 496 (1965); *Mitchell Standard Corp.*, 140 N. L. R. B. 496 (1963).

[13] *Emerald Maintenance, Inc.*, 188 N. L. R. B. No. 139 (1971). *Emerald* involved a civilian contractor who undertook to provide certain maintenance services at an Air Force base. During the preceding year, the same services had been performed by two other companies whose employees were represented by a union that had

In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the union but also to observe the pre-existing contract rather than to face uncertainty and turmoil. Also, in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract. Cf. *Oilfield Maintenance Co., Inc.*, 142 N. L. R. B. 1384 (1963). Such a duty does not, however, ensue as a matter of law from the mere fact than an employer is doing the same work in the same place with the same employees as his predecessor, as the Board had recognized until its decision in the instant case. See cases cited *supra*, at 284. We accordingly set aside the Board's finding of a § 8 (a)(5) unfair labor practice insofar as it rested on a conclusion that Burns was required to but did not honor the collective-bargaining contract executed by Wackenhut.

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negotiated collective-bargaining agreements that had not yet expired. The employer performed the work with substantially the same employee complement as had its predecessors. The Board held that the employer had a duty to recognize and bargain with the union but could not agree with the trial examiner that the employer was bound by the provisions of the contract, emphasizing in this respect the impact of the Service Contract Act of 1965, 79 Stat. 1034. The case was considered as presenting unusual circumstances justifying an exception to the *Burns* rule; the Board noted that "[t]his case suggests the hazards of enforcing the contracts of one employer against a successor where annual rebidding normally produces annual changes in contractor identity. These circumstances might encourage less arm's-length collective bargaining whenever the employer had reason to expect that it would not be awarded the next succeeding annual service contract." An *amicus* strongly contends that the *Emerald* rule is inconsistent with *Burns* and is based on a misreading of the legislative history of the Service Contract Act of 1965. Brief for AFL–CIO as *Amicus Curiae* 23 n. 2.

IV

It therefore follows that the Board's order requiring Burns to "give retroactive effect to all the clauses of said [Wackenhut] contract and, with interest of 6 percent, make whole its employees for any losses suffered by reason of Respondent's [Burns'] refusal to honor, adopt and enforce said contract" must be set aside.[14] We

[14] In its entirety, the Board's order required Burns to:

"1. Cease and desist from:

"(a) Refusing to bargain collectively, upon request, with the Union as the exclusive bargaining representative of its employees in the above-described unit.

"(b) Refusing to adopt, honor and enforce its contract with the Union, as successor of Wackenhut.

"(c) Assisting or recognizing AFG as the representative of its employees for the purposes of collective bargaining, unless and until said labor organization shall have been certified as the exclusive bargaining representative of said employees in an appropriate unit.

"(d) Interfering with representation of its employees through labor organizations of their own choosing.

"(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to join or assist the Union or otherwise engage in activities protected by the Act.

"2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

"(a) Withdraw and withhold recognition from AFG until or unless it is certified as bargaining representative of Respondent's employees in an appropriate unit.

"(b) Bargain collectively, upon request, with the Union and, if any understanding is reached, embody such understanding in a signed agreement.

"(c) Honor, adopt and enforce the contract between Respondent, as successor to Wackenhut, and the Union and give retroactive effect to all the clauses of said contract and, with interest of 6 percent, make whole its employees for any losses suffered by reason of Respondent's refusal to honor, adopt and enforce said contract.

"(d) Post at its Lockheed, Ontario, California, operations copies of the notice attached hereto as 'Appendix.' Copies of said notice,

note that the regional director's charge instituting this case asserted that "[o]n or about July 1, 1967, Respondent [Burns] unilaterally changed existing wage rates, hours of employment, overtime wage rates, differentials for swing shift and graveyard shift, and other terms and conditions of employment of the employees in the appropriate unit . . . ," App. 113, and that the Board's opinion stated that "[t]he obligation to bargain imposed on a successor-employer includes the negative injunction to refrain from unilaterally changing wages and other benefits established by a prior collective-bargaining agreement even though that agreement had expired. In this respect, the successor-employer's obligations are the same as those imposed upon employers generally during the period between collective-bargaining agreements." App. 8–9. This statement by the Board is consistent with its prior and subsequent cases that hold that whether or not a successor employer is bound by its predecessor's contract, it must not institute terms and conditions of employment different from those provided in its predecessor's contract, at least without first bargaining with the employees' representative. *Overnite Transportation Co., Inc.*, 157 N. L. R. B. 1185 (1966), enforced *sub nom. Overnite Transportation Co.* v. *NLRB*, 372 F. 2d 765 (CA4), cert. denied, 389 U. S. 838 (1967); *Valleydale Packers, Inc.*, 162 N. L. R. B. 1486 (1967), enforced *sub*

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to be furnished by the Regional Director for Region 31, shall after being signed by Respondent's authorized representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by any other material.

"(e) Notify said Regional Director, in writing, within 20 days from the date of the receipt of this Recommended Order what steps Respondent has taken to comply herewith."

nom. NLRB v. *Valleydale Packers, Inc.*, 402 F. 2d 768 (CA5 1968); *Michaud Bus Lines, Inc.*, 171 N. L. R. B. 193 (1968); *Emerald Maintenance, Inc.*, 188 N. L. R. B. No. 139 (1971). Thus, if Burns, without bargaining to impasse with the union, had paid its employees on and after July 1 at a rate lower than Wackenhut had paid under its contract or otherwise provided terms and conditions of employment different from those provided in the Wackenhut collective-bargaining agreement, under the Board's view, Burns would have committed a § 8 (a) (5) unfair labor practice and would have been subject to an order to restore to employees what they had lost by this so-called unilateral change. See *Overnite Transportation Co., supra; Emerald Maintenance, Inc., supra.*

Although Burns had an obligation to bargain with the union concerning wages and other conditions of employment when the union requested it to do so, this case is not like a § 8 (a) (5) violation where an employer unilaterally changes a condition of employment without consulting a bargaining representative. It is difficult to understand how Burns could be said to have *changed* unilaterally any pre-existing term or condition of employment without bargaining when it had no previous relationship whatsoever to the bargaining unit and, prior to July 1, no outstanding terms and conditions of employment from which a change could be inferred. The terms on which Burns hired employees for service after July 1 may have differed from the terms extended by Wackenhut and required by the collective-bargaining contract, but it does not follow that Burns changed *its* terms and conditions of employment when it specified the initial basis on which employees were hired on July 1.

Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is per-

fectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9 (a) of the Act, 29 U. S. C. § 159 (a). Here, for example, Burns' obligation to bargain with the union did not mature until it had selected its force of guards late in June. The Board quite properly found that Burns refused to bargain on July 12 when it rejected the overtures of the union. It is true that the wages it paid when it began protecting the Lockheed plant on July 1 differed from those specified in the Wackenhut collective-bargaining agreement, but there is no evidence that Burns ever unilaterally changed the terms and conditions of employment it had offered to potential employees in June after its obligation to bargain with the union became apparent. If the union had made a request to bargain after Burns had completed its hiring and if Burns had negotiated in good faith and had made offers to the union which the union rejected, Burns could have unilaterally initiated such proposals as the opening terms and conditions of employment on July 1 without committing an unfair labor practice. Cf. *NLRB* v. *Katz*, 369 U. S. 736, 745 n. 12 (1962); *NLRB* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 272–273 (CA2) cert. denied, 375 U. S. 834 (1963); *NLRB* v. *Southern Coach & Body Co.*, 336 F. 2d 214, 217 (CA5 1964). The Board's order requiring Burns to make whole its employees for any losses suffered by reason of Burns' refusal to honor and enforce the contract, cannot therefore

be sustained on the ground that Burns unilaterally changed existing terms and conditions of employment, thereby committing an unfair labor practice which required monetary restitution in these circumstances.

Affirmed.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE BRENNAN, and MR. JUSTICE POWELL join, concurring in No. 71–123 and dissenting in No. 71–198.

Although the Court studiously avoids using the term "successorship" in concluding that Burns did have a statutory obligation to bargain with the union, it affirms the conclusions of the Board and the Court of Appeals to that effect which were based entirely on the successorship doctrine. Because I believe that the Board and the Court of Appeals stretched that concept beyond the limits of its proper application, I would enforce neither the Board's bargaining order nor its order imposing upon Burns the terms of the contract between the union and Wackenhut. I therefore concur in No. 71–123 and dissent in No. 71–198.

The National Labor Relations Act imposes upon an employer the obligation "to . . . bargain collectively with the representatives of his employees . . . ." 29 U. S. C. § 158 (a)(5). It also defines those representatives, in § 159 (a), as "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes . . . ." The union must establish its status as a majority representative either by one of the methods discussed in *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575 (1969), or because its certification as a representative of the employees of another employer binds Burns as a "successor."

The Court concludes that because the trial examiner and the Board found the Lockheed facility to be an appropriate bargaining unit for Burns' employees, and because Burns hired a majority of Wackenhut's previous employees who had worked at that facility, Burns should have bargained with the union, even though the union never made any showing to Burns of majority representation. There is more than one difficulty with this analysis.

First, it is by no means mathematically demonstrable that the union was the choice of a majority of the 42 employees with which Burns began the performance of its contract with Lockheed. True, 27 of the 42 had been represented by the union when they were employees of Wackenhut, but there is nothing in the record before us to indicate that all 27 of these employees chose the union as their bargaining agent even at the time of negotiations with Wackenhut. There is obviously no evidence whatever that the remaining 15 employees of Burns, who had never been employed by Wackenhut, had ever expressed their views one way or the other about the union as a bargaining representative. It may be that, if asked, all would have designated the union. But they were never asked. Instead, the trial examiner concluded that because Burns was a "successor" employer to Wackenhut, it was obligated by that fact alone to bargain with the union.

The second problem with the Court's reasoning is that it relies on the Board's approval of the Lockheed plant as an appropriate unit to support its conclusion that Burns must bargain with the union. While it is true, as the Court notes, that the trial examiner and the Board found the Lockheed facility to be an appropriate bargaining unit for Burns' employees, it is equally true that the trial examiner's finding to this effect was clearly dependent upon the previous stipulation between

Wackenhut and the union.[1] One of the reasons asserted by Burns for declining to recognize the union was its belief that the single Lockheed facility was not an appropriate bargaining unit. This was more than a colorable claim. Unlike Wackenhut, Burns had never bargained with a union consisting of its employees in a single job location. One of the reasons for this difference was that Burns made a practice of transferring employees from one job to another, on a temporary or permanent basis. Both Burns and Wackenhut had numerous security guard jobsites in Southern California; for administrative purposes, Wackenhut treated each jobsite as a separate unit, while Burns treated large numbers of them together.

The Court says in effect that the Burns employees at Lockheed were found by the Board to be an appropriate unit; that Burns has not expressly preserved that point for review here; and that Burns is therefore obligated to bargain with the previously certified union. But the major premise leading to this conclusion, the determination of the appropriate unit, was itself established by the Board and sustained by the Court of Appeals solely under the doctrine of successorship. Burns is neither required to expressly challenge the designation of the bargaining unit, nor to prevail in such a challenge in order to demonstrate the error in the bargaining order. Burns has expressly challenged the determination that underlay both the determina-

[1] "While a broader unit might have been appropriate, I find a unit of guards limited to a single facility as an appropriate unit. Here, the certification was pursuant to a consent election agreement." Trial Examiner's decision, App. 22.

"Trial Examiner: I am not concerned with whether or not there was a hearing. The Regional Director approved of the consent election and stipulation, and the election having taken place, I would find that the Regional Director's action was properly conducted in due course . . . ." Proceedings before the NLRB, App. 68.

tion as to bargaining unit and the bargaining order—the finding of successorship.

Thus, in a situation where there was no evidence at the time as to the preference of a majority of the employees at the Lockheed facility as to a bargaining agent, and there was no independent finding that the employees at that facility were an appropriate unit as to Burns, the Board nonetheless imposed the duty to bargain. This result is sustainable, if at all, only on the theory that Burns was a "successor" to Wackenhut.[2] The imposition of successorship in this case is unusual because the successor instead of purchasing business or assets from or merging with Wackenhut was in direct competition with Wackenhut for the Lockheed contract. I believe that a careful analysis of the admittedly imprecise concept of successorship indicates that important rights of both the employee and the employer to independently order their own affairs are sacrificed needlessly by the application of that doctrine to this case.

It has been aptly observed that the doctrine of "successor" employer in the field of labor law is "shrouded in somewhat impressionist approaches."[3] In *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543 (1964), we employed a form of the "successor" doctrine to impose upon an employer an obligation to arbitrate disputes under an arbitration clause in an agreement entered into between a predecessor employer and the bargaining representative of the latter's employees. The doctrine has been applied by the Board and by the courts of

[2] The Court's emphasis, *ante*, at 275–276, on the Board's determination that Burns committed unfair practices by aiding the AFG cannot be taken as any support for the bargaining order. It merely supports the cease-and-desist order directing Burns to stop such practices, which has not been challenged here by Burns.

[3] *International Assn. of Machinists* v. *NLRB*, 134 U. S. App. D. C. 239, 243, 414 F. 2d 1135, 1139 (1969) (Leventhal, J., concurring).

appeals to impose upon the successor employer a duty to bargain with representatives of the employees of his predecessor, *NLRB* v. *Auto Ventshade, Inc.*, 276 F. 2d 303, 304 (CA5 1960); *Makela Welding, Inc.* v. *NLRB*, 387 F. 2d 40, 46 (CA6 1967), to support a finding of unfair labor practices from a course of conduct engaged in by both the predecessor and the successor, *NLRB* v. *Blair Quarries, Inc.*, 152 F. 2d 25 (CA4 1945), and to require the successor to remedy unfair labor practices committed by a predecessor employer, *United States Pipe & Foundry Co.* v. *NLRB*, 398 F. 2d 544 (CA5 1968). The consequences of the application of the "successor" doctrine in each of these cases has been that the "successor" employer has been subjected to certain burdens or obligations to which a similarly situated employer who is not a "successor" would not be subject.

The various decisions that have applied the successor doctrine exhibit more than one train of reasoning in support of its application. There is authority for the proposition that it rests in part at least upon the need for continuity in industrial labor relations, and the concomitant avoidance of industrial strife that presumably follows from such continuity. *NLRB* v. *Colten*, 105 F. 2d 179 (CA6 1939); *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F. 2d 1025 (CA7 1969). On examination, however, this proposition may more accurately be described as a statement of the result of a finding of successorship, rather than a reason for making that finding.

Other cases have stated the guiding principle to be whether the "employing industry" remains essentially the same after the change in ownership. *NLRB* v. *Tempest Shirt Mfg. Co., Inc.*, 285 F. 2d 1 (CA5 1960); *NLRB* v. *Alamo White Truck Service, Inc.*, 273 F. 2d 238 (CA5 1959). Under this approach a variety of facts relating to the "employing industry" have been examined to see whether a sufficient number remain unchanged to warrant the imposition of succes-

sorship. While it cannot be doubted that a determination as to successorship will vary with different fact situations, some general concept of the reason for the successor doctrine is essential in order to determine the importance of the various factual combinations and permutations that may or may not call for its application.

This Court's opinion in *Wiley* makes it clear that one of the bases for a finding of successorship is the need to grant some protection to employees from a sudden transformation of their employer's business that results in the substitution of a new legal entity, not bound by the collective-bargaining contract under contract law, as the employer, but leaves intact significant elements of the employer's business. The Court said there:

> "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by 'the relative strength . . . of the contending forces'. . . ." 376 U. S., at 549.

But other language in *Wiley* makes it clear that the considerations favoring the continuity of existing bargaining relationships are not without their limits:

> "We do not hold that in every case in which the ownership or corporate structure of an enterprise is changed the duty to arbitrate survives. As indicated above, there may be cases in which the lack of any substantial continuity of identity in the business enterprise before and after a change would

> make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." 376 U. S., at 551.

The conflicting implications in these portions of the opinion in *Wiley* suggest that employees are indeed entitled to a measure of protection against change in the employing entity where the new employer continues to make use of tangible or intangible assets used in carrying on the business of the first employer. They also make clear that the successorship doctrine, carried to its ultimate limits, runs counter to other equally well-established principles of labor law. Industrial peace is an important goal of the Labor Management Relations Act. But Congress has time and again refused to sacrifice free collective bargaining between representatives of the employees and the employer for a system of compulsory arbitration.[4] As the Court said in *NLRB* v. *Insurance Agents*, 361 U. S. 477, 488 (1960):

> "The mainstream of cases before the Board and in the courts reviewing its orders, under the provisions fixing the duty to bargain collectively, is concerned

[4] "Except in isolated instances, . . . Congress and the Supreme Court have refused to compel, or even to allow, that form of governmental compulsion of economic decisions which has come to be called 'compulsory arbitration.'" Jones, Compulsion and the Consensual in Labor Arbitration, 51 Va. L. Rev. 369 (1965).

"In dealing with the problem of the direct settlement of labor disputes the committee has considered a great variety of the proposals ranging from compulsory arbitration, the establishment of fact-finding boards, creation of an over-all mediation tribunal, and the imposition of specified waiting periods. . . . [W]e do not feel warranted in recommending that any such plans become permanent legislation." S. Rep. No. 105, 80th Cong., 1st Sess., 13 (1947). See also the speech by Senator Taft, during debate on the Taft-Hartley Act, 93 Cong. Rec. 3835–3836, cited in *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383, 395 n. 21 (1951).

> with insuring that the parties approach the bargaining table with this attitude [good faith]. But apart from this essential standard of conduct, Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences."

And this Court has recently held that the Board itself may not compel one of the parties in the collective-bargaining process to agree to any particular proposal of the other. *H. K. Porter Co., Inc.* v. *NLRB*, 397 U. S. 99 (1970). Conceivably the imposition of a system of compulsory arbitration, or the granting of authority to the Board to insist that the parties at some point agree on particular terms of a potential contract, would lessen the risk of industrial strife. But Congress has plainly been unwilling to purchase industrial peace at the price of substantial curtailment of free collective bargaining by the freely chosen representatives of the employees with their employer.

There is also a natural tension between the constraints imposed on employers by the Labor Management Relations Act, and the right of those employers in competition with one another "independently to rearrange their businesses and even eliminate themselves as employers." *Wiley*, 376 U. S., at 549. An employer's ability to compete in his market is affected, of course, by the terms of whatever collective-bargaining agreement he negotiates with the representative of his employees. Aside from the direct influence on price brought about by the terms of a collective-bargaining agreement, the collective-bargaining process itself presents a certain cost factor that may affect competition between employers in the market.[5] The national commitment to collective bar-

[5] The Government Accounting Office has recognized that bidders for a cost-plus-fee subcontract to NASA, who dealt with different

gaining embodied in the Labor Management Relations Act either requires or permits many of these constraints. But quite reasonable expectations of the employees in a particular collective-bargaining unit may be disappointed by a voluntary change in the condition of the employer that is quite incapable of being remedied by any rational application of the successorship doctrine. An employer is free to cease doing business, even though he chooses to do so wholly because of anti-union animus. *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263 (1965). An employer may adamantly refuse, at the expiration of the period covered by a collective-bargaining agreement, to again consent to a particular term of the agreement that the employees regarded as significant. *NLRB* v. *American National Insurance Co.*, 343 U. S. 395 (1952). These examples of permissible employer conduct for which the Labor Management Relations Act provides no remedy, notwithstanding that the conduct results in the disappointment of legitimate expectations of employees, suggest that the successorship principle, like every other principle of law, has limits beyond which it may not be expanded.

Wiley, supra, speaks in terms of a change in the "ownership or corporate structure of an enterprise" as bringing into play the obligation of the successor employer to perform an obligation voluntarily undertaken by the predecessor employer. But while the principle enunciated in *Wiley* is by no means limited to the corporate merger situation present there, it cannot logically be extended to a mere naked shifting of a group of employees from one employer to another without totally disregarding the basis for the doctrine. The notion of a change in the

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unions, could be evaluated by NASA on the basis of varying costs that collective bargaining itself might generate. 76 Lab. Rel. Rep. 230 (1971).

"ownership or corporate structure of an enterprise" connotes at the very least that there is continuity in the enterprise, as well as change; and that that continuity be at least in part on the employer's side of the equation, rather than only on that of the employees. If we deal with the legitimate expectations of employees that the employer who agreed to the collective-bargaining contract perform it, we can require another employing entity to perform the contract only when he has succeeded to some of the tangible or intangible assets by the use of which the employees might have expected the first employer to have performed his contract with them.

Phrased another way, the doctrine of successorship in the federal common law of labor relations accords to employees the same general protection against transfer of assets by an entity against which they have a claim as is accorded by other legal doctrines to nonlabor-related claimants against the same entity. Nonlabor-related claimants in such transfer situations may be protected not only by assumption agreements resulting from the self-interest of the contracting parties participating in a merger or sale of assets but also by state laws imposing upon the successor corporation of any merger the obligations of the merged corporation (see, *e. g.*, § 90 of the N. Y. Stock Corp. Law (1951), cited in *Wiley, supra*), and by bulk sales acts found in numerous States.[6] These latter are designed to give the nonlabor-related creditor of the predecessor entity some claim, either as a matter of contract right against the successor, or as a matter of property right to charge the assets that pass from the predecessor to the successor. The implication of *Wiley* is that the federal common law of labor relations accords the same general type and degree of protection to employees claiming under a collective-bargaining contract.

[6] Uniform Commercial Code §§ 6–101 to 6–111.

Cases from the courts of appeals have found successorship, consistently with these principles, where the new employer purchases a part or all of the assets of the predecessor employer, *NLRB* v. *Interstate 65 Corp.*, 453 F. 2d 269 (CA6 1971); where the entire business is purchased by the new employer, *NLRB* v. *McFarland*, 306 F. 2d 219 (CA10 1962); and where there is merely a change in the ownership interest in a partnership that operates the employing entity, *NLRB* v. *Colten*, 105 F. 2d 179 (CA6 1939). Other courts of appeals have, equally consistently with these principles, refused to find successorship where there have been no contractual dealings between the two employers, and all that has taken place is a shift in employees. *Tri State Maintenance Corp.* v. *NLRB*, 132 U. S. App. D. C. 368, 408 F. 2d 171 (1968); *International Assn. of Machinists* v. *NLRB*, 134 U. S. App. D. C. 239, 414 F. 2d 1135 (1969).

The rigid imposition of a prior-existing labor relations environment on a new employer whose only connection with the old employer is the hiring of some of the latter's employees and the performance of some of the work which was previously performed by the latter, might well tend to produce industrial peace of a sort. But industrial peace in such a case would be produced at a sacrifice of the determination by the Board of the appropriateness of bargaining agents and of the wishes of the majority of the employees which the Act was designed to preserve. These latter principles caution us against extending successorship, under the banner of

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[7] A finding of successorship has been upheld, on the other hand, by one court of appeals where there were no contractual dealings between the two employers, and the successor employer merely replaced the predecessor as a successful bidder for a transit franchise. *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F. 2d 1025 (CA7 1969).

industrial peace, step by step to a point where the only connection between the two employing entities is a naked transfer of employees. Justice Holmes in *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908), summarized the general problem this way:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

Burns acquired not a single asset, tangible or intangible, by negotiation or transfer from Wackenhut. It succeeded to the contractual rights and duties of the plant protection service contract with Lockheed, not by reason of Wackenhut's assignment or consent, but over Wackenhut's vigorous opposition. I think the only permissible conclusion is that Burns is not a successor to Wackenhut. Following its decision in this case, the Board concluded in *Lincoln Private Police*, 189 N. L. R. B. No. 103 (1971), that an employer of guards was not a successor, saying:

> "Respondent, moreover, has operated as an entirely new and independent business enterprise. It obtained its own operating capital, purchased new uniforms, vehicles, and equipment, and occupied different premises than Industrial. Additionally, there is no indication that there has been any carryover of supervisory personnel from Industrial to Respondent." 189 N. L. R. B., at —.

See also *Tri State Maintenance Corp.* v. *NLRB*, 132 U. S. App. D. C. 368, 408 F. 2d 171 (1968).

To conclude that Burns was a successor to Wackenhut in this situation, with its attendant consequences under the Board's order imposing a duty to bargain with the

bargaining representative of Wackenhut's employees, would import unwarranted rigidity into labor-management relations. The fortunes of competing employers inevitably ebb and flow, and an employer who has currently gained production orders at the expense of another may well wish to hire employees away from that other. There is no reason to think that the best interests of the employees, the employers, and ultimately of the free market are not served by such movement. Yet inherent in the expanded doctrine of successorship that the Board urges in this case is the notion that somehow the "labor relations environment" comes with the new employees if the new employer has but obtained orders or business that previously belonged to the old employer. The fact that the employees in the instant case continued to perform their work at the same situs, while not irrelevant to analysis, cannot be deemed controlling. For the rigidity that would follow from the Board's application of successorship to this case would not only affect competition between Wackenhut and Burns, but would also affect Lockheed's operations. In effect, it would be saddled, as against its competitors, with the disadvantageous consequences of a collective-bargaining contract unduly favorable to Wackenhut's employees, even though Lockheed's contract with Wackenhut was set to expire at a given time. By the same token, it would be benefited, at the expense of its competitors, as a result of a "sweetheart" contract negotiated between Wackenhut and its employees. From the viewpoint of the recipient of the services, dissatisfaction with the labor relations environment may stimulate a desire for change of contractors. *E. g., Tri State Maintenance Corp.* v. *NLRB, supra;* 76 Lab. Rel. Rep. 230 (1971). Where the relation between the first employer and the second is as attenuated

as it is here, and the reasonable expectations of the employees equally attenuated, the application of the successorship doctrine is not authorized by the Labor Management Relations Act.

This is not to say that Burns would be unilaterally free to mesh into its previously recognized Los Angeles County bargaining unit a group of employees such as were involved here who already have designated a collective-bargaining representative in their previous employment. Burns' actions in this regard would be subject to the commands of the Labor Management Relations Act, and to the regulation of the Board under proper application of governing principles. The situation resulting from the addition of a new element of the component work force of an employer has been dealt with by the Board in numerous cases, and various factors are weighed in order to determine whether the new workforce component should be itself a separate bargaining unit, or whether the employees in this component shall be "accreted" to the bargaining unit already in existence. See, *e. g., NLRB* v. *Food Employers Council, Inc.*, 399 F. 2d 501 (CA9 1968); *Northwest Galvanizing Co.*, 168 N. L. R. B. 26 (1967). Had the Board made the appropriate factual inquiry and determinations required by the Act, such inquiry might have justified the conclusion that Burns was obligated to recognize and bargain with the union as a representative of its employees at the Lockheed facility.

But the Board, instead of applying this type of analysis to the union's complaints here, concluded that because Burns was a "successor" it was absolutely bound to the mold that had been fashioned by Wackenhut and its employees at Lockheed. Burns was thereby precluded from challenging the designation of Lockheed as an appropriate bargaining unit for a year after the original certification. 61 Stat. 144, 29 U. S. C. § 159 (c)(3).

I am unwilling to follow the Board this far down the successorship road, since I believe to do so would substantially undercut the principle of free choice of bargaining representatives by the employees and designation of the appropriate bargaining unit by the Board that are guaranteed by the Act.